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Supreme Court, U.S.
FILED

98 139 JUL 13 1998

No. 98-

In the

Supreme Court of the United States

OCTOBER TERM, 1998

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PABLO FERNANDEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 13, 1998

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QUESTIONS PRESENTED

1. Where a defendant is convicted of narcotics conspiracy but no narcotics were actually sold or introduced into evidence, does the burden of proving, under the Sentencing Guidelines, the defendant's capacity to produce the negotiated amount of narcotics rest with the government or the defendant?

2. 28 U.S.C. §46 requires that every federal appeal be decided by a panel consisting of a majority of judges from that circuit. Is that rule violated when an appeal is decided by a two-judge panel consisting of one circuit judge and one lower federal judge from outside the circuit?

LIST OF PARTIES

Petitioner Pablo Fernandez is the only party seeking review of the judgment below.

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Pablo Fernandez ("Fernandez") respectfully petitions this Court for a writ of certiorari to review the April 13, 1998 and July 27, 1997 decisions of the Second Circuit in this case, the former denying Fernandez's petition for rehearing or rehearing *en banc*, and the latter addressing his appeal of his conviction and sentencing on a federal narcotics conspiracy charge after a December 1994 jury trial in the Southern District of New York.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals denying rehearing is reported as *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998), reproduced in the Appendix at 1. The opinion of the Court of Appeals addressing the merits of the appeal is reported as *United States v. Desimone*, 119 F.3d 217 (2d Cir. 1997), reproduced in the Appendix at 5. The district court's judgment of conviction, entered January 5, 1996, is reproduced in the Appendix at 27. The transcript of a post-trial hearing on January 19, 1995 before the trial judge concerning Fernandez's motion for a mistrial is reproduced in the Appendix at 31. The transcript of Fernandez's sentencing hearing on December 22, 1995 is reproduced in the Appendix at 41. The Presentence Investigation Report ("PSI") dated September 21, 1994, which was relied upon by the trial judge at sentencing, is reproduced in the Appendix at 57.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The Second Circuit decision denying Fernandez's petition for rehearing was entered in the court's docket on April 13, 1998.

STATUTE AND REGULATIONS INVOLVED

This petition is concerned with the interpretation of one statute, 28 U.S.C. §46, reproduced in the Appendix at 81, and two regulations, United States Sentencing Guidelines §2D1.1, pertinent sections of which are reproduced in the Appendix at 83; and §3C1.1, reproduced in the Appendix at 87.

STATEMENT OF THE CASE

On July 7, 1994, a jury convicted Fernandez and co-defendant Felix Nunez of conspiring to distribute narcotics. On January 19, 1995, the district court denied Fernandez's motion to set aside the verdict and for a new trial. On December 22, 1995, Fernandez was sentenced to 121 months incarceration and ordered to pay a special assessment of $50. He timely filed a notice of appeal to the Second Circuit on January 2, 1996.

A. "Dry" Narcotics Conspiracy Case

The trial depicted a failed government investigation. A government informant engaged in numerous tape-recorded conversations with several individuals, including Fernandez, in the hopes of purchasing narcotics. Although the informant never made a purchase, the government prosecuted all of those with whom he spoke, including Fernandez. The government offered no evidence that Fernandez was capable of supplying the five kilograms of cocaine for which the informant bargained.

B. Sentencing Proceedings

On December 22, 1995, Fernandez appeared for sentencing before Judge John E. Sprizzo. At the hearing, Fernandez's counsel argued that Fernandez should not be held responsible for five kilograms of cocaine, the amount used by the PSI to calculate his base offense level of 32. *App.* at 49-50.

Judge Sprizzo reminded counsel that, when petitioner's co-defendant, Felix Nunez, had advanced the same argument at his sentencing earlier that day, the judge allowed him to testify to support his argument, and then penalized him for his perceived perjury by sentencing him at the top of the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G.") range of 121-151 months, or the bottom of the next Guidelines range with a two-level perjury enhancement. *Id.* at 50-51. Judge Sprizzo then informed Fernandez that if he too elected to make the argument that he should not be held responsible for five kilograms of cocaine, then the judge would penalize him for doing so by also sentencing him to 151 months imprisonment, rather than the 121 months recommended in the presentence report.

When Fernandez attempted to put his opposition to the five kilogram figure on the record, Judge Sprizzo further stated that he was already convinced by a preponderance of the evidence that Fernandez had in fact possessed the capacity to deliver five kilograms of cocaine, despite the fact that no evidence of such capacity had been introduced by the government at trial or at the sentencing hearing. Confronted with Judge Sprizzo's prejudgment of the issue,[1] Fernandez declined the opportunity to testify on his own behalf, and Judge Sprizzo sentenced him to 121 months incarceration. *Id.* at 55.

C. Petitioner's Second Circuit Appeal

On appeal to the Second Circuit, Fernandez raised several arguments, of which the following are relevant for the purposes of this petition: whether the district court, at sentencing, (i) erred in finding Fernandez responsible for five kilograms of cocaine; and (ii) unconstitutionally chilled Fernandez's right to testify on his own behalf.

The appeal in this case was argued on October 11, 1996 before a three-judge panel in the Second Circuit consisting of Circuit Judges Mahoney and Cardamone, and Judge Restani from the Court of International Trade. Less than two weeks after the argument, Judge Mahoney died. More than nine months later, the Second Circuit issued its first opinion in the case ("*Fernandez I*"), with Judges Cardamone and Restani affirming Fernandez's conviction. In their opinion, the remaining panel members invoked Local Rule §0.14(b), which provides that if a judge of an original three-member panel dies, the remaining two panel members may render an opinion if they are in agreement and neither requests the designation of a third judge. On the sentencing point at issue in this petition, the panel opinion reversed Second Circuit precedent and shifted the burden of proof of capacity to deliver narcotics from the government to the defendant.

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[1] For example, at one point Judge Sprizzo interrupted Fernandez:

> I hate to say this, but you can only talk yourself into an increased sentence, not a lower one.
>
> . . . .
>
> I don't believe what you are telling me now. All right? I would be prepared to make a finding — without a hearing, since you had not asked for one — by a preponderance of the evidence, that you are misstating the case to me now.

App. at 55.

D. Petition For Rehearing

In his petition to the Second Circuit for rehearing or rehearing *en banc*, which requested a reconsideration of his sentencing claims, Fernandez argued that the panel opinion was rendered in violation of 28 U.S.C. §46(b), which requires that each case in a federal appeals court be determined by a panel of three judges, a majority of whom must be judges of that court. In response, the Second Circuit issued a second opinion, authored by Chief Judge Winter, joined by Judges Cardamone and Restani, denying the petition for rehearing. *See United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998) ("*Fernandez II*"). This second opinion stated that the original opinion had been rendered by a duly constituted quorum of the original panel, and was therefore legitimate. The opinion summarily dismissed the substantive arguments made by Fernandez. *Id.* at 459.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS ON AN IMPORTANT SENTENCING GUIDELINES PROVISION CONCERNING THE BURDEN OF PROVING CAPACITY TO DELIVER NARCOTICS IN A CONSPIRACY CASE

Defendants in federal narcotics conspiracy cases frequently contend that because they never intended to, or were not capable of, supplying a negotiated amount of narcotics, their sentence should be reduced. In the absence of clear guidance under the Sentencing Guidelines,[2] courts of appeals have responded to this argument in two

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[2] The Guidelines presently provide:

> In an offense involving an agreement to sell a controlled

(footnote continued on next page...)

contradictory ways. Certain courts of appeals have held that the defendant carries the burden of proving the absence of intent or capacity to supply the negotiated amount of narcotics, while others have ruled that the government bears the burden of establishing intent or capacity. Several courts of appeals have noted the existence of the

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[2] (...footnote continued from preceding page)

> substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense.... If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

Application Note 12 to U.S.S.G. §2D1.1 (1998). *App.* at 87.

The Guidelines were amended in 1995, between Fernandez's conviction and sentencing. The earlier version provides:

> In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

Former Application Note 12 to U.S.S.G. §2D1.1 (1995).

Under the Guidelines, courts generally must apply the version of the Guidelines in effect at the time of sentencing, 18 U.S.C. §3553(a)(4)(A), unless an amendment in between the time of the offense and the time of sentencing imposes a more onerous burden on the defendant. Neither the Second Circuit nor the district court identified the version of the Guidelines it deemed applicable, and Fernandez's argument applies equally to either version.

split in authority on this frequently-applied Guideline. *See, e.g.*, *United States v. Hazut*, 140 F.3d 187, 192 (2d Cir. 1998).

A. In this case, the Second Circuit reversed itself and held that the defendant must establish lack of intent or capacity

Judge Sprizzo sentenced Fernandez on the assumption that he was capable of supplying five kilograms of cocaine. *App.* at 50-51. On appeal, Fernandez argued that this assumption was incorrect because he never intended to — and in fact, never did — procure any cocaine. In making this argument, Fernandez relied upon *United States v. Hendrickson*, 26 F.3d 321, 332-34 (2d Cir. 1994). In *Hendrickson*, the Second Circuit held that a district judge sentencing a convicted conspiracy defendant must exclude from the sentencing calculation any amount of drugs alleged to have been under negotiation but not necessarily delivered that the defendant did not intend to provide or was not reasonably capable of providing. Moreover, the Second Circuit held that the burden of proving the relevant amount of drugs for sentencing purposes under §2D1.1[3] lies squarely with the government. *Id.* Specifically, the *Hendrickson* court held that the government must prove the relevant offense conduct by "a preponderance of reliable evidence demonstrat[ing] that the defendant and a culpable co-conspirator *intended* to produce such an amount." *Id.* at 338 (emphasis added).

The Second Circuit's opinion in *Fernandez I* marked a dramatic retreat from *Hendrickson*. In fact, rather than giving *Hendrickson* its natural reading, the court "read *Hendrickson* to hold only that where a defendant disavows a prior representation of his intent and ability to obtain narcotics, the sentencing court must consider those contradictory statements in its assessment of the defendant's capability and intent." *United States v. Desimone*, 119 F.3d 217, 229 (2d Cir. 1997). The panel's decision not only overruled *Hendrickson* by limiting it to its facts and placing upon Fernandez the burden of disproving capacity and intent — more fundamentally, it also conflicted sharply with caselaw in other circuits on the application of U.S.S.G. §2D1.1.

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[3] At the time *Hendrickson* was decided, §2D1.1 was numbered §2D1.4, and the present Application Note 12 was Note 1.

B. There is a clear split among the circuits concerning whether the government or defendant bears the burden of proving lack of intent or capacity.

There is a fundamental disagreement among the circuits regarding the proper allocation of the burden of proof under U.S.S.G. §2D1.1. The Second, Sixth, Eighth and Ninth Circuits have placed the burden of establishing absence of intent or capacity upon the defendant. In contrast, the First, Third, Seventh and Eleventh Circuits have imposed upon the government the burden of affirmatively establishing that the defendant in fact possessed the intent or capacity to supply the negotiated amount of narcotics.

As described above, the Second Circuit in this case rebuffed petitioner's assertion that the burden of establishing intent and capacity rested squarely with the government and, by limiting *Hendrickson* to its immediate facts, shifted the burden of proof from the government to the defendant. *Desimone*, 119 F.3d at 229. Similarly, the Sixth Circuit held that the burden of proof under §2D1.1 rests solely with the defendant: "once the government satisfies its burden in establishing a negotiated amount, the defendants have the burden of proving that they were not capable of producing that amount." *United States v. Christian*, 942 F.2d 363, 368 (6th Cir. 1991) (construing §2D1.4, an earlier version of §2D1.1). The Eighth and Ninth Circuits have taken the same position. *See United States v. Smiley*, 997 F.2d 475, 481 n.7 (8th Cir. 1993); *United States v. Barnes*, 993 F.2d 680, 684 (9th Cir. 1993).

In contrast, the First, Third, Seventh and Eleventh Circuits have assigned to the government the burden of affirmatively establishing intent or capacity to supply the negotiated amount of narcotics. Thus, in *United States v. Ruiz*, 932 F.2d 1174, 1183-84 (7th Cir. 1991), the Seventh Circuit held that the defendant's statement that he could obtain ten kilograms of cocaine was "hardly the negotiation of a specific drug transaction" justifying a sentence based upon ten kilograms. *Id.* The First, Third and Eleventh Circuits have expressed the same view. *See United States v. Legarda*, 17 F.3d 496, 499-500 (1st Cir. 1994); *United States v. Rodriguez*, 975 F.2d 999, 1008 (3d Cir. 1992); *United States v. Tillman*, 8 F.3d 17, 19 (11th Cir. 1993).

In sum, the federal courts of appeals have staked out fundamentally divergent positions on the appropriate allocation of the burden of proof under Note 12, creating the likelihood that a defendant's sentence will differ dramatically depending on which circuit he or she happens to be sentenced in — the very outcome the Guidelines were intended to avoid. As the *Hazut* court correctly noted, the 1995 amendment has done little to clarify the split among the circuits.

> It is important to note that the amendment to Application Note 12 does not answer the question of who carries the ultimate burden of proof with respect to intent or ability. Somewhat ironically — considering why the new language was inserted — this silence fails to explain exactly what dispute the amendment is designed to address, or in what way the dispute is to be resolved.

140 F.3d at 192.

Thus, "[w]ith the amendment giving no strong direction," *Hazut*, 140 F.3d at 192, courts of appeals continue to divide over the issue of which party is required to prove intent or capacity. Because the predictable and uniform allocation of burdens of proof is essential to the fair application of the Guidelines, this Court should resolve the split in authority among the courts of appeals concerning §2D1.1.

C. The courts of appeals disagree as to whether a sentencing court must make specific factual findings as to intent or capacity

Courts of appeals have been equally inconsistent in stating what findings of fact the sentencing court must make in assessing whether the party has satisfied its burden of proof. Moreover, and more fundamentally, "there is conflict among the circuits as to whether [§2D1.1] requires the district court to make specific findings that the defendant intended and was reasonably capable of producing the negotiated amount." *Smiley*, 997 F.2d at 481 n.7. In this case, the Second Circuit's approval of Judge Sprizzo's summary sentencing procedure placed it on the same side of this debate as the Eighth

Circuit, which also rejected a specific fact-finding requirement as to intent or capacity. *Smiley*, 997 F.2d at 481 n.6.

Yet, the plain text of §2D1.1 affirmatively requires courts to make findings of fact relating to intent and capacity:

> [W]here *the court* finds that the defendant did not intend to produce or was not reasonably capable of producing the negotiated amount, *the court* shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce or was not reasonably capable of producing. Former Application Note 12 to U.S.S.G. §2D1.1 (emphasis added).

In *Ruiz*, 932 F.2d at 1184, the Seventh Circuit recognized §2D1.1's requirement of specific findings of fact when it reversed a district court's conclusory finding that the government had sustained its burden of showing the defendant could supply the negotiated amount of narcotics. Rather than simply relying on the defendant's boastful claim that he could procure the negotiated amount of narcotics, the Seventh Circuit required the sentencing judge to make factual findings relating to whether the defendant actually had the ability to supply the narcotics. The Sixth and Eleventh Circuits have also expressly held that the district court must make specific findings of fact. *United States v. Gessa*, 971 F.2d 1257, 1265 (6th Cir. 1992), *cert. denied*, 516 U.S 1098 (1996); *Tillman*, 8 F.3d at 19. Thus, the Second and Eighth Circuits have, either expressly or implicitly, interpreted §2D1.1 (and its predecessor) in a manner inconsistent with the interpretation of the Sixth, Seventh and Eleventh Circuits.

D. At sentencing, Fernandez's right to testify on his own behalf was impermissibly chilled by the district judge's admonition that he had already made up his mind and would increase his sentence if Fernandez testified

At sentencing, Judge Sprizzo cautioned Fernandez that if he requested a hearing to argue that he had neither the capacity nor the intent to deliver the five kilograms of cocaine upon which his PSI calculated the appropriate base offense level of 32, he would almost certainly enhance his sentence by two levels.[4] This was no idle threat — Judge Sprizzo had already enhanced the sentence of Fernandez's co-defendant Nunez after Nunez attempted to argue that he should not be held responsible for five kilograms of cocaine. *App.* at 50-51.

This Court noted in *United States v. Dunnigan*, 507 U.S. 87, 113 (1993), that an enhancement under §3C1.1 is often inappropriate. For example, the Court noted that an accused may give inaccurate testimony due to confusion, mistake or faulty memory, or may testify as to lack of capacity, insanity, duress or self-defense. In such cases, "[the] testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent." *Id.* at 95. Where the defendant objects to a sentence enhancement based on allegedly perjured testimony, the district court must independently find that the evidence establishes "a willful impediment to or obstruction of justice, or an attempt to do the same," *id.*, in order to apply the §3C1.1 enhancement.

A sentence enhancement pursuant to §3C1.1 is appropriate in certain limited circumstances. Where the defendant proposes to testify as to essential elements of the crime, and there is a real risk that his testimony will be false, it is appropriate for the judge to caution the defendant that his false trial testimony will result in a two-level enhancement at sentencing, should he be convicted. *See United States v. Padron*, 938 F.2d 29, 30 (2d Cir. 1991). Moreover, it is settled that such an enhancement is *only* appropriate where the false testimony at issue relates to an essential element of the crime. *United States v. Bonds*, 933 F.2d 152, 155 (2d Cir. 1991).

In the Second Circuit, the quantity of drugs involved is not a material element of a narcotics conspiracy offense. *United States v. Campuzano*, 905 F.2d 677, 679 (2d Cir. 1990). It follows from these principles that if §3C1.1's perjury enhancement is available only for material obstruction of justice, and if the jury might have heard and believed Fernandez's proposed testimony as to his responsibility for a lesser amount of cocaine than that charged by the government yet still found him guilty of narcotics conspiracy, then it was inappropriate for Judge Sprizzo to threaten to enhance Fernandez's sentence if he testified as to a nonessential element of the offense — i.e., his lack of capacity and intent to produce five kilograms of cocaine.

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[4] *See* U.S.S.G. §3C1.1, which provides for a two-level sentence enhancement for a defendant who obstructs justice by his false testimony. *App.* at 91.

E. The threatened enhancement in this case violated the petitioner's Constitutional right to due process

Judge Sprizzo violated petitioner's due process rights when, by erroneously threatening that he could enhance Fernandez's sentence if he testified as to capacity, he effectively foreclosed Fernandez's right to challenge the PSI's determination that he be sentenced on the basis of five kilograms of cocaine. *App.* at 50-51, 55; *cf. United States v. Pless*, 982 F.2d 1118, 1129 (7th Cir. 1992) (sentencing judge must "approach the sentencing hearing with an open mind, and must give meaningful consideration . . . to objections raised at the sentencing hearing").

Rather than "approach[ing] the sentencing hearing with an open mind," Judge Sprizzo reacted to petitioner's attempt to raise intent and capacity issues by bluntly stating:

> I don't believe what you are telling me now. All right? I would be prepared to make a finding — without a hearing, since you had not asked for one — by a preponderance of the evidence, that you are misstating the case to me now.
>
> . . . .
>
> But you people, you know, you really have to learn that I know you're trying to get out from under what appears to be a harsh jail sentence.

App. at 55. Judge Sprizzo's express refusal to consider petitioner's intent and capacity arguments essentially stripped him of an opportunity to advance them. As the Second Circuit has observed, "expressions of a fixed view based on the presentence report made prior to a hearing are inconsistent with the due process obligations imposed on a sentencing court to consider only reliable and accurate information." *United States v. Pugliese*, 805 F.2d 1117, 1124 (2d

Cir. 1986). This constituted a violation of petitioner's due process right to articulate his views regarding sentencing issues. *Berndt*, 127 F.3d at 257 ("a defendant's due process entitlement to be sentenced on the basis of accurate information implicates the corollary due-process-based opportunity at the sentencing hearing to challenge factors that are reasonably in dispute").

II. THE SECOND CIRCUIT OPINION WAS RENDERED IN VIOLATION OF 28 U.S.C. §46(b), WHICH REQUIRES THAT A MAJORITY OF AN APPEALS COURT RENDERING A DECISION BE MEMBERS OF THE COURT

Fernandez I was issued by only one judge of the Second Circuit, Judge Cardamone, who was joined by Judge Restani of the Court of International Trade, sitting by designation. 28 U.S.C. §46(b) requires that each case in a federal appeals court be determined by a panel of three judges, a majority of whom must be judges of that court:

> In each circuit the court may authorize the hearing *and determination* of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness.

28 U.S.C. §46(b) (emphasis added). In this case, none of the three exceptions to the rule stated above existed: no recusal or disqualification rendered other members of the Second Circuit unavailable to replace Judge Mahoney, nor was a judicial emergency in effect in the Second Circuit at the time the original panel opinion was rendered.[5] Judge Restani is not a member of the Second Circuit. Thus, the panel opinion, rendered by a single judge of the Second Circuit, Judge Cardamone, was a *prima facie* violation of 28 U.S.C. §46(b).

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[5] The Second Circuit recently declared a judicial emergency on March 25, 1998.

A. 28 U.S.C. §46(b) requires that all appeals court cases be determined by a panel of three judges, a majority of whom are members of the court

Fernandez II failed to correct the fundamental flaw in *Fernandez I* — namely, that it was not rendered by a legally authorized panel of judges. The second opinion averred (apparently in *dicta*, as the opinion denied the petition for rehearing and thus, technically, there was no legal issue before the court for decision) that the original panel composition was legitimate because 28 U.S.C. §46(d), which defines a "quorum" in the context of appeals court decisions, states that "[a] majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum." Reasoning that because 28 U.S.C. §46 does not require that a quorum include a majority of judges who are members of the court, the court concluded that it was sufficient that the originally constituted panel of three included a majority who were members of the Second Circuit.

Fernandez II ignored the plain language of §46(b), which requires that all cases before the courts of appeals be heard *and determined* by three judges, a majority of whom are members of the court of appeals hearing the case. While *Fernandez I* was heard by a duly constituted panel, it was not determined by one. This Court construed language in the Urgent Deficiencies Act identical to §46(b)'s three-judge "hear and determine" language in *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132 (1947), and held that where a case had been heard by three judges, but where one of the three fell ill after the hearing and did not participate in the determination of the case, the judgment rendered by the remaining two judges was void *ab initio* because it was not determined by three judges, as the statute required:

> When the framers of the Urgent Deficiencies Act declared that these applications "shall be heard and determined by three judges," we assume that they meant exactly what they said. The requirement that three judges hear and determine an application means that they must adjudicate the issues of law and fact which are presented by the case, a function which implies that they must weigh the arguments and testimony offered by both sides and vote either to grant or deny the relief

> sought by the moving party. . . . All three judges, in other words, must fully perform the judicial function.
>
> . . . .
>
> Moreover, we cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might be reached had they had the benefit of the view and conclusions of the third judge. And should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants and to this Court if the case were appealed.

Id. at 138-139.

28 U.S.C. §46 differs from the Urgent Deficiencies Act in that it does permit a duly constituted "quorum" to render an opinion in a case. As discussed below, such a quorum did not exist in this case. Moreover, all the dangers identified by this Court in *Ayrshire Collieries* — namely, that the missing judge's lack of participation in the case and his inability to express a dissent could have a material impact on the outcome of the case and on the way the case is perceived by this Court when considering a petition for certiorari — exist in this case. These dangers are magnified twofold in this case because not only is Judge Restani not a circuit court judge, she is neither a member of the Second Circuit, nor is she a district court judge with experience in deciding criminal cases. In fact, Judge Restani has no experience in criminal law aside from her occasional stints as a designated judge on circuit court panels. Application of the Sentencing Guidelines is a challenging process that district judges must confront daily, and circuit judges must confront in deciding the ever-increasing volume of appeals against sentence. Judges from specialized courts, such as Judge Restani, cannot draw on that reservoir of experience, and it is particularly dangerous to give such judges half of a panel's decision-making power. The danger is compounded when that power is exercised to overrule a decision of another panel of the circuit.

Where *Fernandez I* reversed the Second Circuit's position on a key Guidelines issue, and where one of the members of the panel rendering the decision is neither a circuit court judge, nor a member of the circuit, nor a judge with any criminal judicial experience, then Congress's intent in promulgating 28 U.S.C. §46 has been thwarted, because the Second Circuit has allowed a single judge of the court to render an opinion reversing the circuit's law and creating precedent in an important area of criminal law. This is the very outcome Congress had hoped to prevent by passing the statute.[6]

B. The Second Circuit decision in *Fernandez I* was not rendered by a duly constituted quorum

Fernandez II justified the panel composition in *Fernandez I* by asserting that one judge from the Second Circuit and one from the Court of International Trade could constitute a quorum of a Second Circuit panel. 28 U.S.C. §46(d) provides: "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." 28 U.S.C. §46(c), in turn, states:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of

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[6] *See, e.g.*, S. Rep. No. 275, 97th Cong., 1st Sess. 19 (1981); 125 Cong. Rec. S12,142 (daily ed. Sept. 7, 1979) (statement of Senator Dole); 125 Cong. Rec. S12,129 (daily ed. Sept. 7, 1979) (statement of Senator Kennedy) (legislative history of the Judicial Improvement Act of 1982). Before Congress enacted the present 28 U.S.C. §46(b), some circuits, including the Second Circuit, frequently seated circuit court panels containing only one judge of the circuit court and two district or senior district judges, often from outside the circuit. *See, e.g., Guardians Assoc. of the New York City Police Dep't v. Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980); *United States v. Clark*, 613 F.2d 391 (2d Cir. 1979); *United States v. Precision Med. Lab., Inc.*, 593 F.2d 434 (2d Cir. 1978); *United States v. DeLeon*, 561 F.2d 421 (2d Cir. 1977).

> all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

Paragraph (c) nowhere mentions district judges or other lower federal court judges who might sit by designation on a panel of three pursuant to paragraph (b), discussed above. Paragraph (c) mentions *only* circuit court and senior circuit court judges. Thus, the quorum defined by paragraph (d) must consist of a majority of a three judge panel, which *majority* is composed of circuit or senior circuit judges. Any other reading of paragraph (d) would render the words "as provided in paragraph (c)" superfluous and meaningless. Had Congress meant to allow a quorum to include judges who were not members of the circuit court, it could have substituted "as provided in paragraph (b)" for "as provided in paragraph (c)" in the definition of "quorum." Instead, it made clear that only circuit court or senior circuit court judges could constitute a quorum under the statute.

Fernandez's reading of the statute is shared by a leading case on the meaning of "quorum" in 28 U.S.C. §46(d), *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953), *cert. denied*, 346 U.S. 925 (1954), in which a petition for rehearing challenged the composition of the panel rendering decision because one of the three circuit judges designated to sit on the panel did not participate in oral argument, having been in an automobile accident on the morning of the argument, yet he later participated in deliberations and wrote the opinion in the case. Called upon to determine whether the case had been decided in accordance with 28 U.S.C. §46, the Fifth Circuit decided that it had:

> What then is the meaning of Section 46(d) of Title 28 of the United States Code, which provides that a majority of the

> number of judges authorized to constitute a division of the court, as provided in paragraph (c), shall constitute a quorum? The word quorum as therein used means such a number *of the members of the court* as may legally transact business. The term arose from the Latin words which were used in the commission formerly issued to justices of the peace in England, by which commission it was directed that no business of certain kinds should be done without the presence of one or more of certain justices specially designated.

(Emphasis added.) The Second Circuit recently cited *Tobin v. Ramey* with approval in a case where one judge of a three-judge panel composed entirely of circuit judges recused himself after oral argument, and where another of the judges was not present for argument but listened to a tape recording of it. The court rejected the petition for rehearing, holding that a quorum of the panel had rendered the opinion. *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 233 (2d Cir. 1998). Despite its apparent approval of the Fifth Circuit interpretation of §46(d), however, Judge Winter's *Fernandez II* opinion rejects its central holding: that a quorum of an appeals court panel must include a majority of *judges of that court* who are entitled to transact business on its behalf.

In concluding that *Fernandez I* was a properly rendered decision, Judge Winter's *Fernandez II* opinion relied upon another Second Circuit decision in which a panel of three Second Circuit judges was seated to hear an appeal, but one of the judges recused himself immediately before oral argument, and the remaining two judges heard the argument and rendered an opinion. *Murray v. National Broad. Co.*, 35 F.3d 45 (2d Cir. 1994). Because this situation was one explicitly contemplated by 28 U.S.C. §46(b), and which did not conflict with 28 U.S.C. §46(d)'s definition of "quorum," the court had little difficulty rejecting the petition for rehearing in that case. *Murray* is clearly distinguishable from Fernandez's case, in which the original panel of two circuit judges and one lower federal court judge was duly constituted, but where the panel rendering the decision violated 28 U.S.C. §46(b) because a majority of the panel did not consist of members of the Second Circuit, and violated 28 U.S.C. §46(d) because the judges rendering decision did not constitute a quorum as defined by the statute.

C. The legislative history and law of this Court support Fernandez's position

The *Fernandez I* panel's failure to meet the requirements of 28 U.S.C. §46 is not mere harmless error; as discussed above, it allowed a prior decision of the circuit on a key Guidelines provision to be overturned by a single judge of the court — the very type of outcome that 28 U.S.C. §46 was drafted to avoid. This Court, in addressing the Urgent Deficiencies Act's similar statutory requirement for three-judge panels, enforced that requirement in language strikingly applicable to the case at hand:

> The policy of requiring the deliberation of three judges in suits to enjoin the enforcement of Interstate Commerce Commission orders is thus a well-established one. It is grounded in the legislative desire to guard against ill-considered action by a single judge in the important and complex situations frequently presented by Commission orders. Such matters are deemed to warrant the full deliberation which a court of three judges is likely to secure.
>
> This requirement, of course, is necessarily technical. It is not a broad social measure to be construed with liberality. It is a technical rule of procedure to be applied as such. While due consideration must be given to the statutory policy of expediting the disposition of applications to enjoin the enforcement of Commission orders, the plain language of the Urgent Deficiencies Act compels strict adherence to the command that such applications "shall be heard and determined by three judges, of whom at least one shall be a circuit judge." And we must insist upon obedience to that legislative will even though the disposition of some applications may thereby be delayed.

Ayrshire Collieries, 331 U.S. at 136-37 (internal citation omitted).

Judge Winter in *Fernandez II* cited a Fifth Circuit decision, *Lee v. Coahoma County*, 37 F.3d 1068, 1068 n.1 (5th Cir. 1993), in which the opinion was rendered by a two-judge panel consisting of one circuit judge and one judge sitting by designation, in support of his argument that a similar procedure in Fernandez's case was equally legitimate. Yet the Fifth Circuit never decided the issue squarely presented here — it simply employed the same procedure used by the Second Circuit in this case. The fact that other litigants have been willing to acquiesce in a facially insufficient procedural practice by the courts of appeals does not, of course, legitimize the practice. Fernandez is entitled, by statute, to a hearing and determination of his case before a panel of three judges, at least two of whom are Second Circuit judges; if the court must decide by quorum, then both judges must be members of the Second Circuit — otherwise, the case must be reheard before a duly constituted panel or before the circuit *en banc*.

D. The procedure used in *Fernandez I* is unlikely to be reversed by the courts of appeals, requiring intervention by this Court

The issue of whether a quorum of a circuit court panel may include only one judge from the circuit is not one which affects only this case. With the federal appellate caseload increasing each year, the circuit courts have relied increasingly on non-circuit court judges to participate in and render opinions. In addition to the several cases cited immediately above in which circuit courts rendered decisions with only one member of the court in the "quorum," an increasing number of appeals are now heard *ab initio* by panels consisting of only one circuit judge and two district judges. *See, e.g., Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1 (1st Cir. 1998); *Ricketts v. Vann*, 32 F.3d 71 (4th Cir. 1994); *cf. In re Melon Produce, Inc.*, 976 F.2d 71 (1st Cir. 1992) (one circuit judge from First Circuit, two circuit judges from outside circuit). Data compiled by the Federal Judicial Center indicates that as of 1993, at least 188 federal appeals court decisions had been rendered by panels with two judges sitting by designation. Since the Second Circuit declared a judicial emergency in March

1998, at least thirty cases in the circuit have been decided by such one-circuit judge panels.[7]

Some commentators have suggested that circuit panels with two district judges might be considered acceptable if the district judges sitting by designation are from within the circuit in question.[8] This argument would not rescue the panel composition in *Fernandez*, however, as Judge Restani is neither a district court judge nor a member of the Second Circuit. The situation where the alleged quorum included only one circuit judge and a federal district judge from outside the circuit apparently has occurred only once before, in *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976), where after one circuit judge withdrew due to illness, the case was decided by one Fifth Circuit judge and a district judge from Virginia. This case, however, was decided prior to the adoption of the current 28 U.S.C. §46.

As noted above, given the appellate courts' increasing reliance upon district judges and other non-circuit court judges, the situation is bound to occur with increasing frequency. No published opinion has addressed the issue of whether such panels, in which members of the circuit court are in the minority, violate 28 U.S.C. §46(b). Indeed, given the increasing reliance by the circuit courts upon such panels, it is difficult to conceive of a situation where the circuit courts themselves will rule the procedure improper — a fact which further underlines the necessity for this Court to act to halt this practice.

The Second Circuit previously has recognized that the legislative history of 28 U.S.C. §46, the codification of §103 of the Federal Courts Improvement Act of 1982, clearly indicated Congress's concern that participation in the appellate process by non-circuit judges decreased the predictability and stability of the process:

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[7] *See, e.g., Wenger v. Canastota Central Sch. Dist.*, --- F.3d ---, 1998 WL 310335 (2d Cir. June 12, 1998); *see also* Deborah Pines, *Regret Greets Crisis Measure for 2d Circuit: Emergency Seen Harming Court's Special Character*, N.Y.L.J., Mar. 26, 1998 (p. 1, col.3).

[8] *See, e.g.*, Richard B. Saphire, Michael E. Solimine, *Diluting Justice on Appeal? An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. Mich. J.L. Reform 351, 360 n.42 (Winter 1995).

> Congress's purpose in enacting §103(b) was to prevent the instability and unpredictability in the law of a circuit that could result if many panels were composed principally of judges from "outside" the circuit. . . . *See, e.g.*, 125 Cong. Rec. S12,129 (daily ed. Sept. 7, 1979) (statement of Senator Kennedy: "The bill requires that Federal appellate panels be composed of at least three judges, at least a majority of whom shall be judges of the circuit court, and that the presiding judge be a judge of that court in regular active service. The bill thus discourages any unnecessary borrowing of judges and promotes stability and predictability by requiring a majority of each panel to be composed of judges of the circuit court.").

In re Bongiorno, 694 F.2d 917, 918 n.1 (2d Cir. 1982). More recently, the Second Circuit recognized that "on matters of substance, where recourse is had to a court of appeals, it is normally preferable, absent an emergency, to have decision rendered by more than an individual judge." *Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988). Unfortunately, the court failed to heed its own admonition in *Fernandez I* and *II*, and is likely to repeat the error in the future unless this Court acts to bar the practice of circuit courts overlooking a statutory mandate when they find it inconvenient.

CONCLUSION

For the foregoing reasons, Pablo Fernandez's petition for a writ of certiorari to the Second Circuit should be granted.

Respectfully submitted,

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July 13, 1998

APPENDIX

UNITED STATES of America,

Appellee,

v.

Frank DESIMONE, Sr.; Thomas Gagliardi, aka "Tommy"; Louis Esa, aka "A.J. Duhe," aka "John McQuire," aka "Louis"; Felix Nunez; Earl Reynolds, aka "Robert Reynolds," aka "Bob," aka "Boo-Boo"; Carl Rogasta, aka "CarmenVignola," aka "Carlo"; Robert Santora, aka "Robert Amato"; Richard Sinde, aka "Richie,"

Defendants,

Pablo Fernandez,

Defendant-Appellant.

Docket 96-1023.

United States Court of Appeals,
Second Circuit.

Petition for Rehearing Aug. 11, 1997.

Decided April 13, 1998.

Defendant was convicted in the United States District Court for the Southern District of New York, John E. Sprizzo, J., of conspiracy to distribute and possess with intent to distribute cocaine, and he appealed. The Court of Appeals, 119 F.3d 217, affirmed. On petition for rehearing, the Court of Appeals, Winter, Chief Judge, held that Court's prior decision, issued by two judges after third judge passed away, was valid even though one remaining judge on panel was not member of court.

Denied.

Jeremy G. Epstein, Shearman & Sterling, New York City (Harmeet K. Dhillon, of counsel), for Defendant-Appellant.

Allen D. Applbaum, Assistant United States Attorney, Southern District of New York, New York City (Mary Jo White, United States Attorney for the Southern District of New York, Craig A. Stewart, Assistant United States Attorney, of counsel), for Appellee.

Before: WINTER, Chief Judge, CARDAMONE, Circuit Judge, and RESTANI, * Judge.

WINTER, Chief Judge:

This is a petition for rehearing. Familiarity with our decision is assumed. *United States v. Desimone*, 119 F.3d 217 (2d Cir.1997). In that decision, a two-judge panel affirmed Fernandez's sentence of 121 months imprisonment following his conviction for conspiracy to distribute and possess with intent to distribute cocaine. The original panel consisted of Judges Cardamone and Mahoney of this court, and Judge Restani of the Court of International Trade, sitting by designation. After oral argument, Judge Mahoney passed away, and the decision was issued by a panel consisting of Judges Cardamone and Restani.

Fernandez's petition for rehearing contends that the panel's decision violated 28 U.S.C. § 46(b) because it was rendered by two judges, only one of whom was a judge of this court. Under Section 46(b), courts of appeals "may authorize the hearing and determination of cases ... by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court." This Section, however, "was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate." *Murray v. National Broadcasting Co.*,

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* The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

35 F.3d 45, 47 (2d Cir.1994); see also 28 U.S.C. § 46(d) ("A majority of the number of judges authorized to constitute a court or panel thereof ... shall constitute a quorum."). Similarly, our local rules provide that where, inter alia, a judge of the original three-judge panel dies, "the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge." 2d Cir. R. § 0.14(b).

Fernandez's petition does not question the authority generally of two judges to render a decision in circumstances in which a member of the authorized panel is unable to participate. Rather, he contends that Section 46(b)'s requirement that a majority of a panel be members of the court applies to such two-judge decisions, i.e., both judges must be members of the court. Believing that it would not be appropriate for a two-judge panel with only one member of this court to resolve this particular claim, a member of the panel requested the Chief Judge to designate a judge of the court to sit as a member of the panel hearing the petition for rehearing. I thereafter designated myself.

We deny the petition. As noted, Section 46(d) provides that a majority of judges of an authorized three-judge panel or court in banc shall constitute a quorum. Section 46(d) embodies no requirement that the quorum contain a majority of judges who are members of the court; it requires only that it be a majority of a legally authorized panel. *Cf. Lee v. Coahoma County*, 37 F.3d 1068, 1068 n. 1 (5th Cir.1993) (two-judge panel consisting of one judge of that court and one judge sitting by designation constitutes a "quorum"). This view of Section 46(d) is in no way inconsistent with the requirement of Section 46(b). Section 46(b) requires only that a three-judge panel, absent impossibility because of recusal or certification of a judicial emergency by the chief judge, have two members of the court on it when "authorized." Notably, it does not require that the ultimate decision on the merits be concurred in by a majority of members of the court. In the present case, the panel, when authorized, met the requirements of Section 46(b). When

Judge Mahoney became unable to participate, Judges Cardamone and Restani constituted a quorum under Section 46(d). They had the power, therefore, to render a decision.

The petition for rehearing's claims regarding the substance of the panel's decision are also without merit, and the petition is denied.

UNITED STATES of America,

Appellee,

v.

Frank DESIMONE, Sr.; Thomas Gagliardi, aka "Tommy"; Louis Esa, aka "A.J. Duhe", aka "John McQuire", aka "Louis"; Felix Nunez; Earl Reynolds, aka "Robert Reynolds", aka "Bob", aka "Boo-Boo"; Carl Rogasta, aka "CarmenVignola", aka "Carlo"; Robert Santora, aka "Robert Amato"; Richard Sinde, aka "Richie,"

Defendants,

Pablo Fernandez,

Defendant-Appellant.

No. 440, Docket 96-1023.

United States Court of Appeals,
Second Circuit.

Argued Oct. 11, 1996.

Decided July 28, 1997.

Defendant was convicted in the United States District Court for the Southern District of New York, John E. Sprizzo, J., of conspiracy to distribute and possess with intent to distribute cocaine, and he appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) evidence was sufficient to support conviction; (2) evidence at trial did not vary from indictment charging single conspiracy; (3) jury was properly charged on government's burden of proof; (4) negotiated quantity of cocaine was attributable to defendant under Sentencing Guidelines; and (5) enhancement for obstruction of justice was not predetermined.

Affirmed.

Jeremy G. Epstein, New York City (Harmeet K. Dhillon, Shearman & Sterling, New York City, of counsel), for Appellant Pablo Fernandez.

Allen D. Applbaum, Assistant United States Attorney, New York City (Mary Jo White, United States Attorney, Craig A. Stewart, Assistant United States Attorney, Southern District of New York, New York City, of counsel), for Appellee United States of America.

Before: CARDAMONE, MAHONEY,* Circuit Judges, and RESTANI,** Judge.

CARDAMONE, Circuit Judge:

Defendant Pablo Fernandez appeals from a December 22, 1995 judgment of the United States District Court for the Southern District of New York (Sprizzo, J.) convicting him of one count of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. Fernandez' primary challenge on appeal is that the evidence presented was insufficient to support his conviction. He uses this argument as a platform from which he mounts a variety of other challenges to his conviction and sentence; each additional argument depends to some degree on our assessment of the sufficiency of the evidence. That is, it is basically the same argument clothed in different verbal garb. Consequently, because defendant fails to establish that the evidence was deficient, each of the additional, dependent arguments must also fail.

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[*] The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996, and the appeal is being decided by the remaining two members of the panel, who are in agreement. See Local Rule § 0.14(b).

[**] Hon. Jane A. Restani, United States Judge for the Court of International Trade, sitting by designation.

BACKGROUND

An undercover investigation of Louis Esa, who was the alleged leader of a widespread criminal enterprise engaged in counterfeiting, credit card fraud, narcotics distribution, and other crimes, led FBI agents to arrest Ronald Besho, one of Esa's counterfeiting coconspirators. In exchange for a reduced sentence recommendation on counterfeiting charges, Besho agreed to arrange a narcotics transaction with Esa. During the ensuing investigation most of Besho's telephone conversations and many of his face-to-face encounters with the alleged coconspirators were recorded.

At the behest of FBI agents Besho called Esa in December 1991 saying that his friend, "Mike," wanted to purchase cocaine. Esa responded that a person named "Pablo" could supply it. On January 6, 1992 Besho and Esa met at Esa's brother's Manhattan apartment to discuss the proposed transaction. While they talked, Esa packaged three ounces of cocaine into gram bags for street sales, telling Besho that the cocaine had come from defendant Pablo Fernandez, and that Fernandez was expecting another "20 to 30 keys" shortly. Esa stated that defendant planned to give him ten kilograms "to move."

After the January 6 meeting, Esa relocated to Florida, but continued to speak periodically by telephone with Besho. In a conversation recorded on January 14, Esa advised Besho to call Fernandez to find out the price of the cocaine. When Besho asked what his "cut" would be, Esa said he expected to split the profits from the sale with Besho. In a telephone conversation three days later, Esa coached Besho on what to say during the negotiation with Fernandez and instructed him to "get the price, ... make our money, and ... send me my money." On the afternoon of January 20 Besho told Esa that he planned to meet Fernandez later that day, and Esa cautioned him not to bring "Mike" to the meeting for fear that Mike and Fernandez might cut Besho out of the deal.

Later that day Besho, Fernandez, and "Chino," an associate of Fernandez, met at the Columbus Restaurant on Manhattan's Upper West Side. Besho testified that Fernandez agreed to supply five kilograms of cocaine at a price of $16,500 per kilogram and that they had devised a plan for the exchange: Mike would drive the cash for the purchase to a nearby location in his car, and Chino and Fernandez would bring the cocaine in a different car. Besho and Fernandez would then meet at the restaurant, reveal the location of their respective cars, and conclude the transaction by exchanging cars.

The next day, January 21, Besho and Fernandez spoke briefly by phone. Fernandez warned Besho, in code, that he might not be able to provide cocaine at the price quoted the day before, but promised to call the next day with a definite price. Besho and Esa talked on the telephone three times that day. In the first two conversations, they discussed the deal in general terms. During the third call, Esa advised Besho that it would be safer to exchange only one kilogram of cocaine at a time, rather than delivering the cash for all five kilograms at once.

In a series of telephone conversations on the evening of January 21 and the morning of January 22, Fernandez confirmed that he would have to charge $17,000 per kilogram, rather than the $16,500 promised on January 20. Besho initially rejected the higher price, but later told Fernandez that "Mike" still wanted to go ahead with the deal. On January 22 Besho met again with Fernandez and Chino at the Columbus Restaurant to consummate the sale. After Besho assured Fernandez that he had the money nearby, Fernandez sent Chino to get the cocaine. About 20 minutes later, Fernandez told Besho that Chino was nervous about bringing the cocaine to the Upper West Side, and that Besho should instead bring the cash to Washington Heights, where Chino would meet him with the cocaine. Besho called the undercover agent posing as "Mike," who directed him not to travel to Washington Heights. Thus, the planned exchange did not take place.

When Besho called Esa the next day, January 23, to explain why the deal had fallen through, Esa suggested that Besho enlist the aid of Felix Nunez. Nunez agreed, at the request of Besho and Esa, to mediate and told Besho to arrange a meeting with Fernandez at noon the following day. Fernandez and Besho met on January 24 to discuss the problem. Over the course of the following week, Besho, Fernandez, Esa and Nunez continued to discuss the deal, although no money or narcotics ever changed hands. In a telephone conversation on January 27, Esa told Besho that Fernandez and Nunez suspected that Besho was an informant. Later that day, Nunez called Besho and then put Fernandez on the line to talk to Besho about the proposed sale.

On January 29 Besho had a three-way conversation with Fernandez and Esa. They discussed Fernandez' fear that Besho was a cop or an informant, and Fernandez again urged Besho to complete the five-kilogram sale in Washington Heights. Esa urged Besho to agree to Fernandez' plan. In the end, however, the transaction was never consummated because Besho adamantly refused to travel to Washington Heights and Fernandez just as adamantly refused to make the exchange anywhere else.

Fernandez, Nunez, Esa and others were eventually charged in a multi-count indictment alleging multiple acts of narcotics conspiracy and trafficking, robbery, credit card fraud, counterfeiting, and forgery. On February 15, 1994 Judge Sprizzo granted Fernandez' motion to sever Count 19, the only count in which appellant was named. Following a three-day jury trial, Fernandez and Nunez were convicted of conspiring to violate federal narcotics laws, in violation of 21 U.S.C. § 846. Fernandez was later sentenced to 121 months imprisonment, to be followed by five years supervised release and a mandatory $50 special assessment. From this conviction, Fernandez appeals. We affirm.

DISCUSSION

I Conspiracy

A. Standards of Proof for Conspiracy

Appellant argues first that the evidence presented at trial was insufficient to show either that a conspiracy existed or that he intended to sell narcotics to Besho. A defendant seeking to overturn a conviction on the grounds that the evidence was insufficient bears a heavy burden. *United States v. Russo,* 74 F.3d 1383, 1395 (2d Cir.), cert. denied, – U.S. –, 117 S.Ct. 293, 136 L.Ed.2d 213 (1996); *United States v. Wallace,* 59 F.3d 333, 338 (2d Cir.1995). A conviction challenged on sufficiency grounds will be affirmed if, viewing all the evidence in the light most favorable to the prosecution, a reviewing court finds that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Pitre*, 960 F.2d 1112, 1120 (2d Cir.1992). A reviewing court must view the evidence as a whole, see *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir.1989), and give deference to the jury's resolution of the credibility of witnesses where there is conflicting testimony. See *United States v. Pelaes*, 790 F.2d 254, 259 (2d Cir.1986). Further, the government's proof need not exclude "every possible hypothesis of innocence." *United States v. Friedman,* 998 F.2d 53, 59 (2d Cir.1993) (internal quotations omitted).

In order to prove a conspiracy, the government must show that two or more persons agreed to participate in a joint venture intended to commit an unlawful act. See *United States v. Martino*, 664 F.2d 860, 876 (2d Cir.1981). Because a conspiracy requires the participation of at least two culpable co-conspirators, *United States v. Hendrickson*, 26 F.3d 321, 333 (2d Cir.1994), it follows that "[a] person who enters into such [a conspiratorial] agreement while acting as an agent of the government, either directly or as a confidential informant, lacks the criminal intent necessary to render him a bona fide co-conspirator." *United States v. Vazquez*, 113 F.3d 383, 387 (2d Cir.1997).

The existence of – and a particular defendant's participation in – a conspiracy may be established entirely by circumstantial evidence. See *United States v. Gordon*, 987 F.2d 902, 907 (2d Cir.1993). Moreover, the conspiratorial agreement itself may be established by proof of a tacit understanding among the participants, rather than by proof of an explicit agreement, see id. at 906, and the absence of an actual sale or seizure of narcotics does not render insufficient the proof of a conspiracy to distribute it, see *United States v. Sureff*, 15 F.3d 225, 228-29 (2d Cir.1994) (upholding conspiracy conviction where cocaine never explicitly mentioned, no drugs seized, and no direct testimony as to drug transactions).

An individual defendant's membership in a conspiracy may not be established simply by his presence at the scene of a crime, nor by the fact he knows that a crime is being committed. Instead, membership requires proof of purposeful behavior aimed at furthering the goals of the conspiracy. See *United States v. Torres*, 901 F.2d 205, 220 (2d Cir.1990). Once the existence of a conspiracy has been shown, it does not take overwhelming proof to link additional defendants to it. See *Casamento*, 887 F.2d at 1156.

B. Conspiracy Standards Applied to Instant Case

Appellant contends the government did not prove there was an agreement between him and any of the alleged coconspirators. The government concedes that as a government informant Besho cannot be considered a culpable coconspirator. Fernandez maintains that the proof before the jury was also insufficient to support a finding that he entered into an agreement with either Esa or Nunez.

1. Agreement with Esa. Fernandez asserts no conspiratorial agreement existed between him and Esa because Esa's

role was simply to introduce Besho to him. For this proposition, he relies on *United States v. Tyler*, 758 F.2d 66, 69 (2d Cir.1985) and *United States v. Hysohion*, 448 F.2d 343, 347 (2d Cir.1971), where we held that a defendant is not a party to a conspiratorial agreement simply because he introduced a person willing to buy drugs to another person willing to sell them.

In Tyler we reversed the conspiracy conviction of a defendant who introduced an undercover officer to a drug dealer from whom the officer subsequently purchased heroin. 758 F.2d at 70. In reaching that result, we observed that proof that Tyler asked the buyer how much heroin he wanted, that Tyler knew where to obtain heroin and that he knew anything about the seller or his whereabouts was "conspicuously absent." Id. at 68-69. Each of the factors "conspicuously absent" in Tyler is present in this case. When Besho initially told Esa that he was looking for between two and ten kilograms of cocaine for "Mike," Esa recommended that Besho purchase the cocaine from appellant and told Besho how to contact him. Esa professed intimate knowledge of Fernandez' narcotics operation, including details of a substantial shipment of cocaine expected by Fernandez in January 1992. Esa related this information to Besho while he was packaging gram bags of cocaine, which he explained came to him from Fernandez.

The inference that there was an agreement between Fernandez and Esa was bolstered by Esa's continued involvement in the deal after introducing Besho to Fernandez. Taken in the light most favorable to the government, the evidence showed that Esa acted as both an advisor to Besho and a mediator between Besho and Fernandez as they attempted to consummate the narcotics sale. Esa monitored Besho's progress with Fernandez through regular telephone conversations and maintained independent contact with both Nunez and Fernandez to discuss the proposed transaction. In the January 29 three-way telephone conversation between Esa, Besho and Fernandez, Esa urged Besho to agree to Fernandez' proposal to complete the sale in Washington Heights.

Later, in a final attempt to resolve the conflict between Fernandez and Besho, Esa invited Nunez to help broker the deal. The evidence further demonstrated that Esa's assistance was offered not as a favor, but with an expectation of compensation from the profits of the cocaine sale. Esa's financial stake in the outcome of the negotiations constituted proof of his interest in furthering the goals of the conspiracy. Based on this evidence, the jury could reasonably have concluded that Esa and Fernandez had a tacit agreement to bring about the sale of five to ten kilograms of cocaine to Besho.

2. Agreement with Nunez. Fernandez also contends that the government failed to prove the existence of an agreement between Nunez and himself. Although the agreement between Esa and Fernandez is sufficient to affirm Fernandez' conspiracy conviction, we briefly address this additional contention. The government's evidence, appellant believes, simply proved that Nunez and appellant acted as "freelance competitors" for Besho's business. While this may be one plausible view of the evidence, it is not the only one. Several of the taped conversations indicated that Nunez was working with Fernandez, not competing against him. For example, on January 23, Nunez advised Besho that he could be contacted through Fernandez. On January 27 Nunez and Fernandez were together when they called Besho to discuss the deal – Nunez placed the call then handed the receiver to Fernandez. In a telephone conversation taped on January 29 Nunez explained to Besho that although he would have preferred to supply the cocaine for the deal himself, he didn't want "to go over Pablo [Fernandez'] head." Nunez then described a conversation with Fernandez in which "Pablo said we going [sic] to do it together because he didn't know you ... and I know you and I say [sic] OK." Thus, a jury could reasonably have inferred from both the substance and the circumstances of the taped conversations that appellant and Nunez had entered into an agreement to sell cocaine to Besho.

C. Defendant's Ability to Supply Cocaine

Appellant next maintains that the prosecution failed to show that he was actually capable of supplying "five kilograms and more of cocaine," as alleged in the indictment. As a preliminary matter, we note that because the particular quantity of narcotics is not an element of the offense, a jury's verdict will be upheld where there is evidence that the defendant conspired to sell any quantity of an illegal narcotic substance. See *United States v. Jacobo*, 934 F.2d 411, 415 (2d Cir.1991). Fernandez urges that the government's failure to seize or produce any cocaine proves the defense theory that the cocaine negotiations were designed to lure Besho to Washington Heights with a large amount of cash so that he and his associates could rob Besho of the money, not sell him cocaine. Again, while a jury could have credited the defendant's theory that he intended to rob Besho, the evidence does not compel such a finding.

Fernandez' capacity and intent to deliver the promised quantity of cocaine could, for example, have been inferred from Esa's claim that the three ounces of cocaine he was repackaging on January 6 came from Fernandez, or from Esa's further statement that Fernandez was expecting an additional shipment of 20-30 kilograms that month. The tapes established that Esa and Fernandez knew each other, and the evidence was sufficient to allow the jury to rely on Esa's statements – as Esa was shown to be familiar with the nature and extent of Fernandez' criminal activities – at least with regard to the sale of narcotics. While Fernandez' stubborn insistence on having Besho bring a large amount of cash to Washington Heights could be interpreted as an attempt to maneuver Besho to a convenient location for a robbery, it could also support a finding that Fernandez was an experienced dealer who, though cautious, was nonetheless ready and willing to complete the sale. Faced with competing reasonable inferences drawn from the evidence, we are required to defer to the jury's resolution implicit in its guilty verdict.

Appellant's insistence that the government is or ought to be held to a higher standard of proof where the negotiated quantity of narcotics is not delivered or seized is similarly without merit. We have explicitly rejected the notion that circumstantial evidence is inherently weaker than direct evidence. *Sureff*, 15 F.3d at 229. A narcotics conspiracy may be established entirely by circumstantial evidence if, from inferences fairly drawn, the jury could have found beyond a reasonable doubt that the defendant was guilty of the criminal conduct charged against him. Id. at 228. We believe the quantity and quality of evidence of Fernandez' agreement with Esa and Nunez and his capacity to provide the negotiated amounts of cocaine amply supported defendant's conviction.

II Multiple Conspiracy Charge

Building from his assertion that the government failed to show an agreement between him and any of the alleged coconspirators, Fernandez declares that the court erred in failing to include a multiple conspiracy charge in its jury instructions. Before turning to the merits, we consider the appropriate standard of review.

Ordinarily, when a criminal defendant fails to object to a perceived trial error an appellate court will review that issue only for plain error. Fed.R.Crim.P. 52(b). This rule also applies where a defendant seeks reversal on the ground that a trial court failed to give a jury instruction that was not specifically requested. See *United States v. Lanese*, 890 F.2d 1284, 1290 (2d Cir.1989) (citing Fed.R.Crim.P. 30). Appellant concedes he did not request a multiple conspiracy charge, but avers that because his codefendant, Nunez, unsuccessfully sought such an instruction, his failure to object ought to be excused. See *United States v. Ghazaleh*, 58 F.3d 240, 244 (6th Cir.1995) (declining to limit consideration of court's failure to give multiple conspiracy instruction to plain error review where codefendant's unsuccessful objection could reasonably have led defendant to believe that separate motion was futile), cert. denied, – U.S. –, 116 S.Ct. 716, 133 L.Ed.2d 669 (1996). Because appellant's claim of error would fail under either de novo or plain error review, we need not resolve the waiver issue.

In addition, although Fernandez frames the alleged error as a failure to give a multiple conspiracy instruction, the structure of his argument and the precedents cited in his brief suggest that his argument is perhaps more appropriately characterized as an assertion of an impermissible variance between the conspiracy alleged in the indictment and the conduct proved at trial. While a defendant's failure to object may waive his right to a multiple conspiracy instruction, even where one is warranted, a conviction will be reversed where the defendant can show that (1) the indictment charged a single conspiracy, but the proof disclosed several independent conspiracies, and (2) defendant was so prejudiced by this variance as to be denied a fair trial. *United States v. Johansen*, 56 F.3d 347, 350 (2d Cir.1995); *United States v. Bertolotti*, 529 F.2d 149, 155 (2d Cir.1975).

To determine whether the proof supports a finding of a single or multiple conspiracies, we first examine the scope of the proven criminal enterprises to determine whether any of them fits the pattern of the conspiracy alleged in the indictment. *Johansen*, 56 F.3d at 351 (improper variance where indictment charged single conspiracy but evidence proved only that multiple, unrelated individuals had independently engaged in fraudulent transactions with a single person). We then assess whether the jury could reasonably infer from defendant's conduct that he knowingly took part in the alleged criminal enterprise. Id. In other words, we conduct an inquiry substantially similar to that required to evaluate appellant's claim of insufficiency of the evidence. And, as we have already determined that the proof supports a finding that an agreement existed between Esa, Fernandez, and Nunez – as alleged in the indictment – to sell cocaine to Besho, Fernandez' claim of an improper variance must fail for the same reasons that his insufficiency claim fails.

III Failure to Define Reasonable Doubt

In its instructions to the jury the district court repeatedly advised that the government bore the burden of proving the defendant's guilt beyond a reasonable doubt, although it did not define "reasonable doubt." The following morning, after the jury had already deliberated for approximately three hours, defense counsel brought this omission to the court's attention. While Judge Sprizzo was considering whether to take remedial action, the jury sent him a note indicating it had reached a verdict. The judge then announced he would not accept the verdict, but instead would give a supplemental charge defining reasonable doubt and send the jury back to reconsider its verdict in light of the supplemental instruction. There was no objection to this procedure or the content of the supplemental charge.

After deliberating an additional two and a half hours, the jury returned a verdict of guilty against both defendants. Defendants' subsequent motion for a new trial was denied on the ground that defense counsel's failure to object or move for a mistrial prior to the second deliberation waived the issue. On appeal, Fernandez contends that the initial charge's failure to define reasonable doubt impermissibly tainted the jury's deliberations and, further, that he did not knowingly and voluntarily waive his right to a mistrial.

Although application of the reasonable-doubt standard in criminal cases is required as a matter of due process, "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994). In fact, it has been observed that attempts to clarify reasonable doubt tend to create more confusion than does the expression itself. Note, *Reasonable Doubt: An Argument Against Definition*, 108 Harv. L.Rev.1955, 1957 (1995). Because of the difficulty of articulating an acceptable definition, several circuits, including this one, generally discourage trial courts from attempting to define the term. See, e.g., *United States v. Ivic*, 700 F.2d 51, 69 (2d

Cir.1983); *United States v. Bruce*, 109 F.3d 323, 329 (7th Cir.1997) ("[N]either trial courts nor counsel should attempt to define 'reasonable doubt' for the jury."), petition for cert. filed, – U.S.L.W. – (U.S. June 6, 1997) (No. 96-9271); *United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir.1991); *United States v. Ricks*, 882 F.2d 885, 894 (4th Cir.1989); *Thompson v. Lynaugh*, 821 F.2d 1054, 1060-61 (5th Cir.1987). But see *Friedman v. United States*, 381 F.2d 155, 160 (8th Cir.1967) (trial courts are required to define reasonable doubt); *Blatt v. United States*, 60 F.2d 481, 481 (3d Cir.1932) (same). Hence, a trial court's failure to define reasonable doubt cannot, standing alone, constitute reversible error.

Instead, jury instructions must be viewed in their entirety to ensure that the instructions, read as a whole, correctly convey the reasonable-doubt concept to the jury. *United States v. Birbal*, 62 F.3d 456, 462 (2d Cir.1995). We will disturb a conviction only when it appears reasonably likely that the jury understood the instructions to allow it to convict on evidence insufficient to prove every element of the offense charged beyond a reasonable doubt. See *Victor*, 511 U.S. at 22, 114 S.Ct. at 1251.

In the case at hand, the court's initial charge to the jury repeatedly referred to the reasonable-doubt standard. The jury was instructed that "[t]he government bears the sole and exclusive burden of establishing the elements [of the crime] beyond a reasonable doubt" and that "[e]ach [of those elements] must be proved beyond a reasonable doubt." Judge Sprizzo emphasized that "[the] presumption of innocence remains with the defendant ... until such time, if ever, as you, the jury, are convinced that the government has proved all of the elements of the offense against each defendant beyond a reasonable doubt." Thus, even if the court had declined to add the supplemental charge defining reasonable doubt, the original charge adequately conveyed the appropriate standard of proof to the jury.

Nor do the circumstances surrounding the two deliberation sessions suggest that the jury failed to apply the correct standard. When the jury returned its first verdict, Judge Sprizzo explained that he could not accept the verdict and delivered a standard instruction on the meaning of reasonable doubt. He then directed the jury to recommence its examination of all the evidence in light of the supplemental instruction and stated again that the government bore the burden of proving each defendant guilty beyond a reasonable doubt. The jurors reached their second verdict after deliberating for an additional two hours – an amount of time comparable to that spent prior to reaching the first verdict – which suggests that they took seriously the admonition to review the evidence de novo, without relying on their initial decision. Absent contrary evidence, we assume the jury followed the judge's instructions and applied the proper standard.

Although Fernandez apparently concedes that the substance of the supplemental charge was legally sufficient, he believes the lapse of over 12 hours between the original charge and the "curative" supplemental instruction and the weakness of the government's case against him should be taken into account in determining whether the initial, allegedly improper instruction was cured. Both the timeliness of a trial court's curative measures and the relative weakness of the government's case may be relevant to the prejudice suffered by a defendant as a result of an erroneous instruction. See *United States v. Oliver*, 766 F.2d 252, 254 (6th Cir.1985) (prejudice caused by erroneous instruction not cured where curative instruction given after defense counsel tailored closing argument to initial, erroneous charge). Yet neither a lapse of time nor the relative persuasiveness of legally sufficient evidence can create prejudice where there was no error initially. Because the trial court's first charge was sufficient and legally correct, appellant was not entitled to any curative measures, timely or otherwise. Prejudice may not be found therefore from the manner in which the trial court took such measures.

Fernandez urges he was entitled to a mistrial when the court first discovered the omission of the reasonable doubt instruction from the initial charge. He declares that because he was not specifically offered a mistrial, his waiver of the "right" to a mistrial was not knowing and voluntary. For this proposition, he relies on *United States v. Lane*, 624 F.2d 1336 (5th Cir.1980), where a trial court that had inadvertently omitted several pages of its jury charge, including a definition of reasonable doubt, offered the defendant his choice of three curative alternatives: (1) a supplemental instruction consisting solely of the omitted portions of the charge, (2) a complete recharging of the jury, including both the instructions already given and those omitted, or (3) a new trial. Id. at 1339. After conferring with counsel, Lane elected the second alternative, but on appeal argued that he had not knowingly and voluntarily waived his right to the third alternative, a mistrial. Id. In affirming his conviction the Fifth Circuit noted that Lane's decision to decline the mistrial option was informed by advice of counsel and was entirely voluntary. Id. at 1340.

Lane does not stand for the proposition that trial courts must, sua sponte, offer a mistrial in every case in which the jury charge may have been erroneous. Neither this Circuit nor, to our knowledge, any other has adopted so expansive a rule. Instead, Lane simply reiterates the familiar principle that a waiver not knowingly, intelligently, and voluntarily made will not be enforced. See, e.g., *United States v. Ready*, 82 F.3d 551, 556 (2d Cir.1996) (waiver of a right must be knowing and voluntary to be effective). Because appellant failed to request a mistrial prior to the jury's second verdict, the refusal to grant him one later is reviewed for plain error. As discussed earlier, the failure to define reasonable doubt was not error, plain or otherwise, and appellant should not now be heard to complain because he had the good fortune to win a curative instruction where none was warranted.

IV Sentencing Issues

A. Capacity and Intent

Fernandez challenges the calculation of his offense level under the Sentencing Guidelines as having attributed to him an amount of cocaine that he was not capable of producing. The government has the burden of proving facts relevant to sentencing by a preponderance of the evidence, see *United States v. Jones,* 30 F.3d 276, 286 (2d Cir.1994); *United States v. Podlog*, 35 F.3d 699, 706 (2d Cir.1994), and a reviewing court will reject a sentencing court's factual findings only when they are clearly erroneous, see *United States v. Davis*, 967 F.2d 84, 88-89 (2d Cir.1992).

The Sentencing Guidelines provide that the offense level of a defendant convicted of a narcotics offense is ordinarily governed by the amount of narcotics involved, U.S. Sentencing Guidelines Manual (U.S.S.G.) §§ 2D1.1(a)(3) & (c), and that quantity ordinarily includes the quantity under negotiation unless the sentencing court finds that the defendant lacked the intent and the ability to produce the negotiated quantity, see U.S.S.G. § 2D1.1, comment. (n.12). Where the government contends that the defendant personally negotiated to produce a contested quantity of drugs, the proof must demonstrate that the defendant intended to produce such an amount. *Hendrickson*, 26 F.3d at 332. In addition, where ability and intent are at issue, the sentencing court is obligated to make specific findings of fact that the defendant intended to and was reasonably capable of producing the particular quantity for which defendant is being sentenced. See *Jacobo*, 934 F.2d at 416. The required findings must be sufficient to permit appellate review, a standard that may be satisfied by the sentencing court's adoption of the factual findings in the presentence report. See *United States v. Thompson*, 76 F.3d 442, 457 (2d Cir.1996).

Defendant maintains both that the district court failed to make a sufficiently specific finding as to his ability and intent to produce five kilograms of cocaine and that such a finding, if made, would not be supported by a preponderance of the evidence. The record refutes defendant's first point. When defense counsel raised the issue of Fernandez' capacity to produce the cocaine, the trial court observed that the appropriate offense level depended upon whether defendant had the capacity to deliver the amount alleged and declared that it was "satisfied that [Fernandez and Nunez] had the capacity." When the defendant protested and said he was unable to produce the drugs, the trial judge replied, "I saw the tapes. I tried this case. I don't believe what you are telling me now." Moreover, in his written judgment form Judge Sprizzo expressly adopted the presentence report's factual findings of capacity and intent and its guideline application. The statements at sentencing and in the written judgment are each independently adequate to satisfy the sentencing court's obligation to make findings of fact sufficient to permit appellate review.

Appellant's second argument, that the evidence was insufficient to sustain a finding of capacity and intent, essentially reprises his original argument that the conviction itself was rendered without legally sufficient support. Because we have already determined that the evidence presented at trial was sufficient to allow a jury to find capacity and intent beyond a reasonable doubt, we necessarily conclude that a sentencing court considering the same evidence could reasonably find that the government had established capacity and intent under the less stringent preponderance of the evidence standard applied to disputed issues of fact at sentencing.

Fernandez asserts that this result is at odds with our holding in *Hendrickson*, 26 F.3d 321. In that case Customs informants testified that early in the course of an undercover investigation, Hendrickson had proposed a plan to import 50-60 kilograms of heroin from Nigeria, but he later expressly disavowed the plan, explaining that his Nigerian contacts were not interested and that "we don't have the funds to go." Id. at 325. Hendrickson repeatedly rebuffed informants' attempts to revive the 50-60 kilogram importation scheme with promises that the "big deal" would take place later. Id. at 328. Instead, he offered investigators much smaller quantities and after two years had produced a total of only 77 grams of heroin. Id. at 328-29. At sentencing the trial court found Hendrickson both willing and able to produce 50-60 kilograms of heroin and sentenced him accordingly.

On appeal, we noted that negotiations ordinarily constitute reliable admissions as to a defendant's intent to produce a particular quantity of narcotics in the course of a conspiracy. Id. at 338 n. 10. But see *United States v. Crespo*, 982 F.2d 483, 485 (11th Cir.1993) ("Negotiations between [defendant] and [government] agents were not sufficient in themselves to prove capability of [defendant] to actually produce [proposed quantities of narcotics]."). We also held, however, that a sentencing court should consider whether alleged "negotiations" were sufficiently specific as to logistical concerns such as price, quantity, and delivery to constitute a plan rather than an exploratory discussion or "mere puffery," and whether the coconspirators took any action – such as seeking financing or making arrangements for delivery – to procure the narcotics. *Hendrickson*, 26 F.3d at 338. Because the trial court failed to address the effects of Hendrickson's repeated pre-arrest disavowals of the 50-60 kilogram importation scheme with regard to his ability and intent to produce the amount of heroin charged in the indictment, we remanded for resentencing. Id. at 341.

Fernandez contends that Hendrickson should be broadly read to preclude a finding of capacity to produce a particular quantity of narcotics based solely on evidence that the defendant negotiated to produce that amount. Appellant's reading of Hendrickson ignores its explicit acknowledgement that proof of negotiated amounts of narcotics "will often outweigh any post-conviction claims that the defendant lacked either the intent or the ability to produce the contested amount." Id. at 338 n. 10. Thus, we read Hendrickson to hold only that where a defendant disavows a prior representation of his intent and ability to obtain narcotics, the sentencing court must consider those contradictory statements in its assessment of the defendant's capability and intent.

In none of the taped conversations presented at trial did Fernandez disclaim his promise to supply Besho with five kilograms of cocaine. In fact, the record was replete with proof of his efforts to assure Besho that he had the cocaine in hand and would produce it as soon as Besho agreed to meet him in Washington Heights. Absent evidence other than Fernandez' own post-arrest assertion that he intended to commit a robbery, the sentencing court was justified in relying on Fernandez' pre-arrest promises to deliver five kilograms of cocaine.

Moreover, the negotiations were not the sole evidence on which the court's capacity and intent findings could have been based. The district court was entitled to credit Esa's recorded statements that he had received three ounces (approximately 85 grams) of cocaine from Fernandez and that the latter was expecting a shipment of 20-30 kilograms demonstrated that he had access to large quantities of cocaine and was in the business of selling narcotics. Accordingly, the district court's findings with regard to capacity and intent were not clearly erroneous.

B. Enhancement

Finally, defendant declares the district court chilled his right to testify when it warned him that he risked a sentencing enhancement for obstruction of justice if he insisted on pursuing his claim of lack of intent and capability at a pre-sentencing hearing. Defendant avers this admonition showed that the court had improperly predetermined that the enhancement would apply regardless of the content of defendant's testimony.

An enhancement for obstruction of justice may not be imposed in the absence of a specific finding that the defendant testified falsely as to a material issue with the intent to obstruct justice. See *United States v. Giraldo*, 80

F.3d 667, 680 (2d Cir.), cert. denied, – U.S. –, 117 S.Ct. 135, 136 L.Ed.2d 83 (1996). These findings must be made independently at the time of sentencing, and do not automatically follow when a defendant's testimony has been rejected by a judge or jury. *United States v. Cunavelis*, 969 F.2d 1419, 1423 (2d Cir.1992).

Defendant's declaration that the sentencing court threatened automatic application of the obstruction enhancement is belied by the record. When defense counsel requested a hearing on the issue of capacity and intent, the trial court reminded him that his codefendant, Nunez, had received an obstruction enhancement after he testified at a similar hearing. Judge Sprizzo offered to hold a hearing if Fernandez wanted one. The judge expressly left open the possibility he might change his mind if defendant's testimony was credible, but told Fernandez there would be "a downside" were he to be impeached. These statements did not threaten an automatic obstruction enhancement had defendant insisted on a hearing. Instead, the trial judge simply advised defendant that, in light of the taped telephone conversations almost certain to be introduced in rebuttal to his testimony, he faced a substantial risk of incurring an enhancement if he testified at such a hearing.

We have not held that a sentencing court may not warn a defendant of the possibility of a sentencing enhancement, nor are we inclined to do so in this case. It seems sensible to us for a sentencing court to offer a realistic assessment of the possible, or even probable, negative consequences of pursuing a presentence hearing with respect to a factual issue, provided there has been no predetermination that those consequences will result regardless of the outcome of the requested hearing. Judge Sprizzo's statements show he maintained an open mind as to defendant's credibility. Hence, his warning to Fernandez was not improper.

CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA

V.

Pablo Fernandez

U.S. District
Court Filed
Jan 05 1996
S.D.N.Y.

JUDGMENT IN A CRIMINAL CASE

Case Number: S93cr428-09(JES)

Jay Horlick, Esq., Defendant's Attorney

Allan Applbaum, AUSA

Docketed as a
Judgment
#96-0079 on
1/18/96

THE DEFENDANT: was found guilty on count(s) 19 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	1 USC 846
Nature of Offense	Conspiracy to Distribute and Possess with Intent to Distribute Five Kilograms of Cocaine
Date Offense Concluded	10-13-93
Count Number(s)	19

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 19, which shall be due immediately.

Defendant's Soc. Sec. No.:	099-60-1961
Defendant's Date of Birth:	8-7-61
Defendant's Mailing Address:	143 Bennett Avenue New York, NY 10040
Defendant's Residence Address:	jail
Date of Imposition of Sentence	12-22-95

/s/ John E. Sprizzo USDJ
Hon. John E. Sprizzo USDJ
Date: 12/22/95

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred twenty one (121) months.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not possess a firearm or destructive device.

1. That the defendant make a good faith effort to maintain legitimate employment.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 32
Criminal History Category: I
Imprisonment Range: 121 to 151 months
Supervised Release Range: 5 years
Fine Range: $17,500 to $4 million

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

☑ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Court deemed low end of guideline range adequate punishment for offense charged.
[Hand written]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--x

UNITED STATES OF AMERICA,

v.

PABLO FERNANDEZ,

Defendant.
--x

(S1)93 Cr. 428 (JES)

January 19, 1995

2:30 p.m.

Before:

HON. JOHN E. SPRIZZO,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York

ALLEN D. APPLBAUM
Assistant United States Attorney

HOWARD GOETZ
Attorney for Defendant

[2]

(Case called)

THE COURT: You seem to have some disputes about what the evidence showed at trial. How could that be?

MR. GOETZ: Firstly, I don't mean to be disrespectful not to address your question but the defendant has asked me to request an adjournment of this proceeding.

THE COURT: It has been going on forever.

MR. GOETZ: I understand that, Judge. Nevertheless, he has received mail from other attorneys concerning the new crime – Violent Crime Act about things they have done about cases they have handled and he wants the opportunity to perhaps retain another attorney. Whether that is an influence by Mr. Nunez or not, I don't know, Judge.

May I point out he is in jail, he has been in jail. There is no certainly no prejudice to the government. The defendant can't go anywhere. He is in effect serving his time presentence.

THE COURT: I don't really care except that at some point in time this case has to go to the Court of Appeals. I tried him last May.

MR. APPLBAUM: Last July. It has been six months since the trial.

THE COURT: It has been six months for him to request counsel. I will not give you a protracted

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adjournment for that purpose.

I may consent to one because it doesn't matter but he has had plenty of time. Have I formally acted on your motion for a new trial?

MR. GOETZ: No.

THE COURT: I will do that now.

I read the government's papers and they tend to suggest that I was not even required to define "reasonable doubt," and for the reasons I have already given at the conference and at a previous conference, my failure to define "reasonable doubt" may not have been plain error.

Since no one took an exception to it, it would have to be plain error to do it in trial. Given the precise circumstances of this case which as I recall the history of it, the government asked for an extended adjournment so they could bring Mr. Esa here for trial and the defense counsel pressed for a speedy trial and when the government could offer no reason such as the fact that Mr. Esa might be a possible witness, I respected the strategic decision which you and your co-counsel made and I would say probably correctly that the trial dynamic was better for you both trying this case without Mr. Esa than trying it with Mr. Esa because, after all, as the record will reflect, both of you made much of the fact that Mr. Esa kind of coerced you into being involved in these transactions.

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That defense would not have been so easy if Mr. Esa were here. Since you had a united defense against Mr. Esa as opposed to a divided defense if he were here I think your decision was sound.

I cannot ignore that circumstance in assessing your failure to move for a mistrial earlier because I think it was correct strategically for both of you, you and your co-counsel, and that is why I say that, for the benefit of the Court of Appeals if and when they rule upon this because I expect you will be charged with ineffective assistance of counsel, as most people are when a case goes badly and when new counsel comes in, in not moving for that mistrial earlier.

Now, I will put on the record for the world to read and for the Court of Appeals to consider that your decision, and Mr. Murphy's, decision not to press for the mistrial and to allow the court to reinstruct the jury to recommence its deliberations de novo was, in my sound, a sound and correct exercise of the defense strategy.

Having opted to go to trial without Mr. Esa, a mistrial at that point and the possibility of facing a future trial with Mr. Esa was obviously not necessarily consistent with what you wanted at the moment.

So, therefore, there were sound strategic reasons for going to the jury in the hope that you might get an

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acquittal because the case had been, I think, tried under the most optimum circumstances for you without Mr. Esa being present.

I don't know where he is now and a new trial or mistrial which would have perhaps ensured the possibility that you would be tried with Mr. Esa was not necessarily consistent with what I think to be sound defense strategy.

My problem as a trial judge – as I have indicated, this was a two-day case and I didn't notice that I failed to charge reasonable doubt. My law clerk didn't notice it. The government didn't notice it. Nobody else noticed it.

When it was brought to my attention I would have been perfectly happy to grant the mistrial if the issue had been pressed at the time but I lacked the capacity to grant a mistrial sua sponte. Had I granted a mistrial without a motion from defense counsel there would have been serious problems with respect to double jeopardy and possibility of reprosecution here so my hands were tied. I could not grant a motion for a mistrial until such time as somebody moved for one.

The motion came in, of course, after the jury, three hours later, two and a half hours later, having been told to recommence their deliberations in the face of my supplemental instruction, found your clients guilty.

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Quite frankly, as I indicated to you, had the jury come in five minutes or ten minutes later I would have, perhaps, even notwithstanding all of the above, since it was a two-day trial, and since, obviously, I would have been concerned that the jury had not followed my instructions to recommence the deliberations, if the jury had come in five or ten or fifteen minutes later, I would have had some serious doubts about whether or not they had followed my instruction, but if you check the time of deliberations on the day before which was a Thursday they probably deliberated about two-and-a-half or three hours. They deliberated something comparable to that, perhaps another two hours, on Friday after I reinstructed them, so it appeared to me that I had no rational basis to be concerned that the jury did not listen to my admonition to recommence their deliberations.

If they had come in very shortly I might have granted your motion for a mistrial in which case you would have had to face a trial with Mr. Esa.

I deny your motion for a mistrial for all of those reasons but I will at least make a record for you, because you will not be available to argue your own case in the Court of Appeals, that in my view this was not only a strategic decision on your part and on Mr. Murphy's part not to make that motion assuming that you did for the reasons I

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have given.

I think it was a sound exercise of defense strategy and I might have done the same thing myself if I were in your place.

That being so, I have to deny your motion for a mistrial for a new trial.

MR. GOETZ: There was one other thing not addressed.

Mr. Murphy addressed it, I believe, when he asked to be relieved. That was because of how fast things went, from the time we discovered – Mr. Murphy discovered, I should say to be truthful, he discovered when he awoke that, I don't remember whether the court had charged reasonable doubt.

THE COURT: I know that.

MR. GOETZ: So when we came in in the morning we asked the reporter to read it back. He didn't read it back but he did come and tell us that it wasn't charged.

THE COURT: The problem with that is the jury had reached a verdict before I had the opportunity to reinstruct them. But there was 2-1/2 or 3 hours between the time that I reinstructed the jury and the time they came in with a verdict for you to move for a mistrial.

I can't act unless you move for a mistrial and I am telling you that had the jury – had things really moved

that fast and the jury come back 15 minutes after I reinstructed them, I might have granted your motion for a new trial because it was a two-day case and, frankly, I am not worried about retrying a case, even a long case, if I think the interests of justice require it.

I don't have any real basis to believe that the jury did not heed my admonition and the government's cases against that perhaps I wasn't even required to charge on the definition of reasonable doubt in the first place, but that is something you can argue in the Court of Appeals.

On the precise facts of this case I think what you did made sense. What I did was what I was constrained to do which is not act upon any motion until one was made.

I could not grant a mistrial until you asked for one because I would have then perhaps raised some serious double jeopardy questions and prejudiced the government.

Not withstanding all of the above, if the motion had been made sooner, there was a time lapse between 11:00 and 2:00, as I recall, between the time I reinstructed the jury and the time the jury came in. If they came in with a not guilty, you wouldn't have had to worry. If they came in with a guilty, that is the chance you take.

Those who have been in that seat know you have to make those decisions on the spur of the moment and that is why the Court of Appeals and Supreme Court in Strickland

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protects you.

The suggestion that a defense lawyer is guarantor is something clients don't understand but luckily the Supreme Court does.

To the extent he wants to get a new lawyer – is he CJA? Has he presently retained you?

MR. GOETZ: Yes, I am retained.

THE COURT: You are retained counsel?

MR. GOETZ: Yes, I am.

THE COURT: He wants to retain another lawyer?

MR. GOETZ: That is correct.

THE COURT: If he retains another lawyer, I will give him 30 days to do it.

MR. GOETZ: That is fine.

THE COURT: I will adjourn the sentencing for 30 days. I take it the government does not object to that.

MR. APPLBAUM: No, your Honor.

THE COURT: All right.

When is the other defendant on for sentence?

MR. GOETZ: April something or other.

THE COURT: Why don't you put them down on the same day? Is that easier?

MR. GOETZ: That is fine, Judge.

THE COURT: It doesn't make any since to sentence them separately if they are going up to the Court of

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Appeals.

MR. APPLBAUM: That is April 18 at 1:00.

THE COURT: I will put them both down for sentencing and I will expect new counsel to be retained in 30 days.

You will be relieved upon the retention of new counsel.

If he doesn't retain new counsel in 30 days he better not ask for another adjournment. Fair enough?

MR. GOETZ: Fair enough.

MR. APPLBAUM: So the record is clear, Mr. Fernandez's retention of a new lawyer does not give him the ability to refile the same motion, does it?

THE COURT: That motion has been ruled upon.

MR. APPLBAUM: Okay.

MR. GOETZ: Thank you, your Honor.

THE COURT: He can argue that in the Court of Appeals. That is sufficient protection for him. I don't need to rehear it. I don't care who his new lawyer is. I will make the same ruling for the precise reasons given. This is a case which is very unusual which is why I felt the need to put my opinion on the record.

(Proceeding adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---x

UNITED STATES OF AMERICA,	93 Cr. 428 (JES)
v.	
PABLO FERNANDEZ and FELIX NUNEZ,	December 22, 1995
Defendants.	11:20 a.m.

---x

Before:

HON. JOHN E. SPRIZZO,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
BY: ALLEN D. APPLBAUM
Assistant United States Attorney

JAY HORLICK
Attorney for Defendant Fernandez

JAMES T. MORIARTY
Attorney for Defendant Nunez

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THE CLERK: United States v. Nunez and Fernandez.

THE COURT: Are we finally going to sentence these people?

MR. APPLBAUM: Good afternoon, your Honor. Allen Applbaum for the government.

THE COURT: Does the government have anything you want to say?

MR. APPLBAUM: No, your Honor.

THE COURT: Who represents Mr. Nunez?

MR. MORIARTY: I do, your Honor.

THE COURT: I will hear what you have to say. Any papers that are submitted on the day of argument will not be considered. You will have to tell me orally.

MR. HORLICK: Your Honor, the reason that I am submitting it so late is that I have been ill.

THE COURT: I know, but that is not my problem.

MR. HORLICK: I understand, Judge.

THE COURT: If you have anything to say here, tell me orally.

Go ahead.

MR. MORIARTY: Your Honor, James Moriarty for the defendant, Mr. Nunez. Your Honor, I think as you know, I have put in sentence submissions on this and got a hearing on this and we have pretty much said everything we have to

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say. However, I would just like to protect the record here and make it clear, your Honor, that I recognize your Honor's findings concerning the obstruction issue vis-a-vis my client's testimony.

THE COURT: Did they enhance, under the guidelines, the obstruction?

MR. MORIARTY: The Probation Department recommends that that be done.

THE COURT: That is the 151-month guideline?

MR. MORIARTY: That's correct.

MR. APPLBAUM: Which, your Honor, is incidentally the top of the range of the guidelines.

THE COURT: I have 151 months. On one theory or the other, he is going to wind up with the 151, because, if I don't factor it in as an obstruction, I am going to factor it in in terms of where he would go in the guidelines, in the exercise of my preguideline sentencing discretion. So either way, he would come out with 151 months. If that is not satisfactory, there is nothing he can do about it. Even if I accept your argument and move to the next lower guideline, I am going to sentence him on the top of that range for his false testimony before me. So either way, that is what it will be.

MR. MORIARTY: I understand that, your Honor. I think, though, just briefly, I should protect the record.

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THE COURT: In other words, that won't be of any use?

MR. MORIARTY: I understand, your Honor. The obstruction enhancement is based on paragraphs 47 through 55 in the probation report. It is our position that the Court has made certain findings concerning the testimony of the defendant. It is our position that the defendant did not commit perjury, requiring the enhancement, simply because, although the Court found his initial statements to be minimizing his involvement, by the time he was off the stand, it is our contention, your Honor –

THE COURT: You recanted.

MR. MORIARTY: I don't want to use the word "recant," your Honor, but I think that his finalized testimony was in line with his true involvement with this matter, if I can put it that way.

THE COURT: The last time he was here, he had some other claim with a co-defendant who was not here. Do you remember that one?

MR. MORIARTY: I don't recollect that, your Honor.

THE COURT: Didn't he say he had a co-defendant who was not here?

MR. APPLBAUM: Yes, your Honor.

THE COURT: That is why we adjourned the

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sentencing?

MR. APPLBAUM: Yes, your Honor.

THE COURT: In any event, we are not dealing with formal perjury; we are dealing with enhancement for obstruction of justice. Under the old law, the court makes its own findings, and its own impressions if you will, as to the defendant's credibility. I saw him. I heard him testify. Whether technically he corrected it later is not relevant to my sentencing determination, because, even if corrected later, at the time that he gave it, it was designed to improve his situation. Had I not rejected it, it would have improved his sentence situation. I don't even think he recanted, but the fact that he may have come around to it later would not deprive it of its obstructive characteristics.

But even in a larger sense, it wouldn't make any difference, because even if I did not have the sentence guideline range for obstruction of justice, under the old law, I would have had ample discretion to sentence him to anything within the specified range based upon my assessment of his credibility as a witness. That power still exists with the court.

It has the discretion to fix the sentencing within the guideline range.

On that basis, even if you were correct in everything you have said about the obstruction of justice,

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which I don't think you are, and if I were in the lower guideline range without that two-level enhancement, I would have laid on him the consequences of his testimony here and his consistent pattern, I think, of not being entirely forthright with the Court, for reasons which are understandable. Nobody wants to face this kind of time. But by sentencing him to the top of the lower guideline range, even that way, I come to the same result. However I slice the apple, he has 151 months.

MR. MORIARTY: I understand exactly what your Honor is saying. I appreciate that. There is not much more that I can say, other than instinctually, as counsel, to protect the record, namely, that our objection would have been that the defendant, although he may not be entitled to the safety valve, he would not have been accorded the obstruction. However, I understand precisely what the Court is saying.

THE COURT: Either way, it comes out the same.

MR. MORIARTY: Either way, it comes out the same. I understand that, your Honor.

THE COURT: It just makes it easier for the Court of Appeals. If I gave him 153 months, they would have to consider the issue. As far as I'm concerned, I think 151 months is enough of a judgment in my mind, unless anything he does from here on in persuades you that maybe he was not

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involved, in which case I will deal with it.

MR. MORIARTY: No, your Honor.

THE COURT: Is there anything the defendant wants to say?

DEFENDANT NUNEZ: No, I don't have anything to say.

THE COURT: Well then, I will accept the recommendation of the Probation Department on either theory, either on the theory that the obstruction is warranted or on the theory that, even had the lower guideline range been applicable, I would have sentenced him to 151 months. In any event, I think that is long enough. I don't think I have to go beyond that, and I am not going to do so. So I am giving the minimum sentence called for by the guidelines, or the higher sentence called for by the lower guideline, but either way I think 151 months is an adequate punishment for the offense of which he has been convicted. Five years supervised release. There is no recommendation for a fine because the government does not contend that he has any means of paying a fine.

MR. APPLBAUM: That is correct, your Honor.

THE COURT: Restitution is not applicable. How many counts has he been convicted of, one or two?

MR. APPLBALUM: One, your Honor.

THE COURT: One. There is a $50 special

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assessment. And we have the appellate issue. Let the Court of Appeals rule upon that. Let it come back for a trial.

MR. MORIARTY: We have the issue such as it is.

THE COURT: That is an appellate issue, you know. That should have been resolved a year ago.

MR. APPLBAUM: Your Honor, just so that the record is clear, I know from our previous meetings and attempts at sentencing that we have touched on the issue of whether the presentence report has been reviewed by counsel and the defendant, but if we could just make that clear.

THE COURT: I just want to see if there are any special provisions that they recommend for supervised release. They recommend standard conditions 1 through 13. They will be incorporated. They recommend that he enter into a vocational training program. That I will incorporate in the judgment. I will incorporate the requirement that he make an attempt to secure full-time employment as requested. They will be incorporated in the judgment.

Providing access to all financial records, that will be incorporated as a condition of supervised release. Drug analysis, I will impose that condition. I will impose condition 6, that he cooperate with the INS regarding any possible deportation proceedings. All of those six conditions will be incorporated in the judgment of provision for supervised release. All right?

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MR. MORIARTY: Very well.

THE COURT: Now, I take it he has had a chance to read the presentence report?

MR. MORIARTY: He has, your Honor.

THE COURT: He has read it, and you read it to him?

MR. MORIARTY: That is correct, your Honor.

THE COURT: I advise you of your right to appeal. And I advise you that notice of appeal, to avoid this problem that I have had in other cases, must be filed within ten days.

I will direct you to file a notice of appeal on his behalf so that we don't have a problem later.

MR. MORIARTY: I appreciate that.

THE COURT: Pablo Fernandez. Is it all right with the government that you want to stay here?

MR. APPLBAUM: No, your Honor. Mr. Horlick has submitted a letter, which I just received today, with regard to some objections he has to the presentence report.

THE COURT: It is a little late at this stage. Normally, you have to do it immediately and get a response to it. This sentence has been adjourned so many times that I really don't think I can adjourn it again.

MR. HORLICK: I am not asking the Court to adjourn it. Nothing in my letter would require that, Judge.

THE COURT: Yes, but the law would require me to adjourn it if I were going to pay serious attention to your objection and give the government time to respond to that. Does the government want time to respond to it?

MR. APPLBAUM: No, your Honor. I will be glad to do it orally.

THE COURT: Let the defendant make his objection first.

MR. HORLICK: Judge, my client and I have both gone over the probation report together. I gave him a copy of it some time ago.

THE COURT: Then I will make that finding for the record. What specifically do you object to?

MR. HORLICK: Judge, in paragraphs 5 through 17, there is background information about the beginning of this case.

THE COURT: 5 through 17?

MR. HORLICK: Yes. It has to do with fraudulent American Express cards and traveler's checks.

THE COURT: That is not an issue on trial here, is it?

MR. HORLICK: No, sir. My client had nothing to do with that. He is concerned that, because his report will follow him in the prison system, it may have an adverse effect on him.

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THE COURT: What do you want me to do about that? Leave it, delete it?

MR. HORLICK: I would like you to delete it.

THE COURT: I will delete it. He wasn't convicted for that.

MR. APPLBAUM: No, your Honor. As the Court is aware, it is simply background.

MR. HORLICK: Judge, we also have one other position that we would advance at this time. This case involved conversations between my client and the confidential witness and other people in which they initially started to talk about the sale, my client being the seller, of 5 kilos of cocaine. That sale never took place. Nothing happened, really, other than conversations. Then it developed into a situation where the defendant suggested that, instead of doing 5 kilos, we do I kilo. This is a dry conspiracy. There were never any drugs.

THE COURT: I know that.

MR. HORLICK: Because of that, Judge, there is a question whether the defendant should be sentenced in the 5 kilo guideline range or in a lesser range.

THE COURT: It all depends upon whether or not by a preponderance of the evidence I am satisfied that they had the capacity to deliver that. As I indicated, certainly with respect to Mr. Nunez, who was his co-conspirator, there

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wasn't any question in my mind that, from the evidence in the tapes, that capacity was there.

MR. HORLICK: Judge, the only reason I bring it up now is, we were not present when your Honor made that finding with respect to the co-conspirator.

THE COURT: Why not?

MR. HORLICK: I wasn't here when your Honor made that finding. I think it was done in one of the earlier sessions. It wasn't done here today.

THE COURT: I reviewed exactly the same tape. Well, maybe he wasn't here when he raised the issue. Did he raise the issue?

MR. HORLICK: I'm not certain, Judge.

THE COURT: If he didn't raise the issue, I wouldn't have given him a hearing on that question. Because Mr. Garcia and Mr. Nunez are subject to the adverse side of pressing me to a hearing. Your client might be in the same ballpark, had he given the same testimony and raised the same issue. He has gotten the benefit of a lower guideline range of 121 months because he didn't take the stand and didn't testify and was not cross-examined. Nunez was. Now you apparently want me to give him the benefit of the lower guideline range, when he never challenged that 5 kilo finding until now. If he does challenge that 5 kilo finding, I'm going to have to have another hearing, and your

client is going to be exposed to an obstruction of justice enhancement just like Mr. Nunez was.

All I'm saying is that I don't want to adjourn this sentence again, but if I have to, I will. If you want me to make those findings again, I will hear your client's testimony. Maybe I will change my mind as to him.

MR. APPLBAUM: Your Honor, just so that the government's position is clear on this, the government does not believe that the Court needs to make a finding, based on the testimony at trial.

THE COURT: I know, but he wasn't here. He didn't use the guidelines. If he wants to raise the issue he can raise it.

MR. APPLBAUM: He had an opportunity during trial.

THE COURT: I know he had an opportunity to do it, which is why I find it untimely now. But I like to eliminate appellate issues. If he wants a hearing, I will give him one. If you want one next week, I will give it to you. But there is a downside to it. You have to understand that. Mr. Nunez got the downside of it, because he challenged it, took the stand, and was impeached with tapes which, quite honestly, did not help me believe him. The documentary evidence was overwhelming that these people were involved. At least, that is what the tapes showed. Unless

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your client is going to be better able to deal with that impeachment than Mr. Nunez was, he faces a downside. You really want the benefit of no hearing for purposes of avoiding the possible obstruction enhancement or a higher guideline range, because I may not believe his testimony, and you want the benefit of the lower guideline range. You can't have both. You can have one or the other.

MR. HORLICK: I understand.

THE COURT: What does he want to do?

MR. HORLICK: I have asked my client what he wishes to do. He does not wish to have a hearing.

THE COURT: Well then, I am going to give him the 121 months which are recommended in the presentence report. That is 30 months less than Mr. Nunez got, who quite frequently, against maybe the advice of the lawyers, pressed that issue. He would have had, maybe, a lower sentence if he had not. But I am not being naive about this. I am dealing with transcripts that the government produced at the trial.

Your client so far is ahead of the game. He didn't put himself in a situation where he has caused other people to believe that he has committed perjury and lied to the Court. Your issue is raised late, but I wouldn't cut you off on that theory simply because it means the Court of Appeals is just going to remand it back to me. The reason

why I want to sentence these defendants at the same time is so that they have a common appellate issue, that is one appellate issue.

I have given all the reasons. I keep getting new motions, but I have ruled upon this. There are new motions and then pro se, and I don't know what. I have ruled on that for the precise reason that, until the defense lawyer has made a motion for a mistrial, I could not grant one on my own without getting into double jeopardy problems. Had a timely motion for this problem been made in a two-day trial, I might very well have granted the motion, because it would be no skin off my nose to try a short case again.

However, the other reason I had for denying the application at the time it was made, which was after the jury verdict came in, and after I had reinstructed the jury, was because both defendants in that case were pressing for a speedy trial, because no one wanted to be on trial with Mr. Easa, because to some extent they were going to dump off on Mr. Easa, and it was easier to do that with him out instead of with him here. So there was a strategic advantage to getting these guys to trial without his being here. Now he is here.

I did not grant a mistrial, given the limited power I have to grant a mistrial on my own without a motion, and coupling that with the fact that the defendants had

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every reason to believe that they had a strategic reason for not pressing that motion – which I quite frankly think was good strategy; I would probably have done the same thing myself. Because your case was tried under the most optimum conditions for you and you might just as well take two bites out of it.

Now they both have a common appellate issue. I want to see this case resolved one way or the other, so if it has to be retried, we will retry it again, as I was perfectly willing to do two years ago. When was this case tried, two years ago?

MR. APPLBAUM: July of 1994, your Honor.

THE COURT: A year and a half ago.

MR. APPLBAUM: A year and a half.

THE COURT: And it has been a long time proceeding to sentencing. I don't mind that you are trying cases for two days. That is easy to do. But I couldn't grant a mistrial on my own. That was my big problem, all right? And nobody raised the issue. Not the government. Not the defense counsel. Nobody saw it until the next day, and then I did what I had to do, which was to reinstruct the jury. They came back with a verdict some two or three hours later after they had initially found their verdict. If they had come back in five minutes, it may have been different. But they came back in two hours, which was as much as time

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as they had to deliberate in the first place.

On that record, the Court of Appeals can review, so let me know. But at any rate, I will sentence him to a term of imprisonment of 151 months, which is the lowest I can give him under the circumstances, given the findings that I made, which I think the Court of Appeals can review, and a five-year period of supervised release.

MR. HORLICK: Judge, excuse me. I believe the recommendation was 121.

THE COURT: 121. I did say 151? 151.

MR. HORLICK: You said 151.

THE COURT: 121. I have to give him a chance to make an application.

Mr. Fernandez, is there anything you want to say before I impose sentence?

DEFENDANT FERNANDEZ: Yes, sir. I know, for me, I was going to be in the power of my own right now.

THE COURT: For who?

DEFENDANT FERNANDEZ: For me, I was going to be in the power of my own right now.

THE COURT: Well, what is the question?

DEFENDANT FERNANDEZ: I feel like the government knew I could not produce no 5 kilos, but they also knew, from me talking about it, I was facing the time I was facing, this whole thing was conducted by the government,

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fabricated by the government. It was a steam operation. The government knew that Easa introduced me to Robert Besho, and the government knew they introduced me to Easa, to Rob Besho. The government knew that I could never produce 5 kilos, but they also knew I was talking about facing the time I was facing.

THE COURT: The problem is that your lawyer said you don't want a hearing on that issue.

DEFENDANT FERNANDEZ: All right. I just wanted to put it on the record as well.

THE COURT: I hate to say this, but you can only talk yourself into an increased sentence, not a lower sentence. The 121 months is the lowest sentence I can give you. Now, if you keep talking and tell me that all these things are not true, I may well go ahead and have a hearing on this issue, which your lawyer said you don't want. But which is it? You don't want a hearing or you do want one and I will take your testimony under oath?

DEFENDANT FERNANDEZ: No, that's OK.

THE COURT: If you don't want a hearing, I will just forget what you just said.

DEFENDANT FERNANDEZ: No, I repeal my questions. I just want to repeal my case.

THE COURT: Technically speaking, based on what you have just said, I could go up from the 121 months, all

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right? Because I had a hearing. I saw the tapes. I tried this case. I don't believe what you are telling me now. All right? I would be prepared to make a finding – without a hearing, since you had not asked for one – by a preponderance of the evidence, that you are misstating the case to me now. But I will try to forget that. I will attribute it to human weakness and frailty. I won't go beyond 121 months.

But you people, you know, you really have to learn that I know you're trying to get out from under what appears to be a harsh jail sentence. But if you do get away with that, you are not helping yourself.

But I am not going to hold it against you, because you are human, as is everybody else, and you made a big mistake. You obviously made a big mistake getting involved in that case at all. I am not going to tax you for that mistake. Under the law, I could increase your sentence, but I am not going to do it.

I have given you 121 months. You don't have the financial ability to pay a fine and the government does not suggest that you do, so I will not impose a fine. I will impose the $50 special assessment and I will impose the special conditions of probation. Are there any special conditions of supervised release set forth in the presentence report? I don't see any.

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Yes, there are, that you not possess a firearm or a dangerous weapon, and that you have to maintain legitimate employment, as the other condition sets forth.

I advise you of your right to appeal – you have a right to file a notice of appeal within ten days – so we don't have a problem with this issue later on.

You are going to represent him on appeal?

MR. HORLICK: Yes, your Honor.

THE COURT: I take it there is no reason why either one of you would not be assigned to represent him on appeal.

MR. HORLICK: None that I know of.

THE COURT: All right. My deputy has a question: Was this a two-count indictment?

MR. APPLBAUM: Your Honor, it was a multi-count indictment. The Court severed this count and tried it separately.

THE COURT: Which count is that? 19?

MR. APPLBAUM: I believe so, your Honor.

THE COURT: Just so it is clear for the record, the sentence is being imposed on count 19 of the indictment.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	**PRESENTENCE INVESTIGATION REPORT**
vs.	Docket No. Sl 93 CR 428-09
Pablo Fernandez	Sentence Date: 11/21/94

Prepared For: Honorable John E. Sprizzo
U.S. District Judge

Prepared By: Michael Wasmer
U.S. Probation Officer
New York City
(212) 637-0040, ext. 5160

Assistant U.S. Attorney	Defense Counsel
Allen Applbaum (212) 791-9242	Howard Getz 172 E. 161 Street Bronx, NY 10451 (718) 993-5116

Offense: Count Nineteen - Conspiracy to Distribute and Possess With Intent to Distribute Five Kilograms of Cocaine. (21 USC 846), Class A Felony, 10 year mandatory minimum and up to life imprisonment/ 4,000,000, at least 5 years supervised release, $50 mandatory special assessment.

Release Status:	Arrested on October 18, 1993. On October 22, 1993, released on $100,000 PRB co-signed by mother, father, and brother, secured by $3,000 cash. Strict pretrial supervision with drug testing. Remanded at time of guilty verdict on July 8, 1994.
Detainers:	None.
Related Cases:	None.
Codefendants:	See Charges and Convictions Section of this report.

Identifying Data:

Date of Birth:	8/7/61	Age:	33
Race:	White/Hispanic	S.S.# :	099-60-1961
Sex:	Male	FBI# :	438452KA5
Marital Status:	Married	NYSID# :	None
Education:	Tenth Grade	USM # :	35185-054
Dependants:	Two	Other ID# :	NJ ID# 572165B
Address:	143 Bennett Ave. Apt #1L New York, NY 10040	Citizenship	A# 18791416 (Resident Alien)

Date Prepared:	9/21/94	Date Revised:	10/5/94 1/11/96

1. On October 13, 1993, Superseding Indictment # 93 Cr. 428-9 (JES) was filed in the Southern District of New York.

Count Nineteen
(Conspiracy to Distribute Narcotics)

2. From January of 1992, up to and including October 13, 1993, in the Southern District of New York and elsewhere, the defendants LOUIS ESA, PABLO FERNANDEZ, FELIX NUNEZ, and others, unlawfully conspired to violate federal narcotics laws, Title 21, USC 812, 841 (a) (1) and 841 (b) (1) (A) by distributing and possessing with intent to distribute a schedule II controlled substance, five kilograms of cocaine.

(21 USC 846)

3. On July 8, 1994, Fernandez was found guilty by trial as charged to Count 19 of SI 93 CR 428-9 (JES). Sentencing is scheduled for October 12, 1994, before the Honorable John E. Sprizzo.

4. There is no plea agreement or guideline stipulations between the Government and defense counsel in this case.

The Offense Conduct

5. In this racketeering activity, Louis Esa, Felix Nunez, Pablo Fernandez, Richard Sinde were the primary defendants involved in the distribution of cocaine from October of 1989 through June of 1993 in the New York City area. However, the FBI as well as the Government report that this is a "dry conspiracy" as there has never been any narcotics seized in connection with this instant offense. However, the defendants involved are responsible for discussing as well as organizing the sale of 5 kilograms of cocaine based upon tapes of conversations of the defendants by the FBI as well as the assistance of a cooperating witness ("CI").

6. In December of 1991, the CI recorded a conversation for the FBI between himself and Fernandez in which Fernandez indicates that he can obtain approximately 5 kilograms of cocaine. He was to obtain the cocaine from an unnamed source. The CI had indicated to Fernandez that he had a buyer for the cocaine. At the direction of the FBI the CI contacts Esa regarding the purchase of the cocaine. The CI and Fernandez agreed to meet at the Columbus Restaurant, located in Manhattan to discuss the cocaine deal.

7. On January 20, 1992, the FBI conducted surveillance of a meeting between the CW and Fernandez at the Columbus Restaurant. At the conclusion of the meeting, the CW met with the FBI and informed agents that he had asked Fernandez for 5 kilograms of cocaine. Fernandez agreed to provide the CW with the cocaine. The CW and Fernandez discussed a purchase price for the cocaine of $16,500 per kilogram. At that time, the CW agreed to this price.

8. In addition, the CW informed the FBI that another man was present at the meeting named "Chino". However, the Government reports that as of this writing, "Chino" has not been arrested or indicted in connection with the instant offense.

9. On January 21, 1992 the CW had a telephone conversation with Fernandez and Nunez which was monitored by the FBI. Fernandez stated that the "car" in which the money would be exchanged the cocaine is fine, but that the "guy" (Esa) wanted a little more money for the "car". Fernandez also stated to the CW that "you know what I am trying to tell you?" The deal would take place in Washington Heights.

10. Later that day, the CW had another telephone conversation with Fernandez and Nunez which was monitored by the FBI. Fernandez stated that he could "fix" the CW's "Car" the following day. The Government as well as FBI indicate that this meant that the cocaine deal was now set.

11. On January 22, 1992, the FBI conducted surveillance of a meeting between the CW, Fernandez and "Chino" at the Columbus Restaurant located in Washington Heights. While the CW and Fernandez were meeting at the restaurant, "Chino" left the restaurant. He was followed by the FBI to a location at 9 Cabrini Boulevard, also in Washington Heights.

12. The CW later reported to the FBI that Fernandez and "Chino" had told the CW that the materials (1 initial kilogram of cocaine) were in Washington Heights and available for inspection. However, it should be noted that at that time, FBI case agents, due to security reasons declined to go Washington Heights in order to have the CW pick up the cocaine.

13. Regarding the role of Nunez, sworn testimony by the CW established at trial indicated that the CW knew of Nunez as the CW had gone with Esa to meet Nunez in order to pick up 1 kilogram of cocaine hidden inside a football at an earlier meeting on January 22, 1991. It should be noted that Sinde was also present at this meeting. The CW positively indicated to the FBI that a cocaine transaction took place. Further, the CW was advised by Nunez that he could be contacted through a pager leased by Nunez. Nunez had listed on the application for the pager his employer, Lucy's Furniture Store which is located in Washington Heights. In addition, tape recorded conversations indicated that Nunez entered the narcotics conspiracy at the request of ESA.

14. On January 23, 1992, the CW had a telephone conversation with Fernandez which was monitored by the FBI. Fernandez stated that he was disappointed that the transaction had not taken place as planned the day before. Fernandez further stated that he was disappointed that the CW had not come "up" to see "it". He also complained that the CW could have brought the money for "one", and further stated that if he (Fernandez) had wanted to rob the CW, he could have told the CW to bring the money for "five."

15. Testimony at trial as well as tape recorded conversations established that after January 22, 1992 the CW had contact with Nunez regarding the planned cocaine transaction. However, a location for the transaction could not be agreed upon. Further, Esa reportedly tried to assure Nunez and Fernandez that the CW was "ok" and not a police officer as the CW had used drugs with them in their presence.

16. On January 29, 1992, during a telephone conversation between the CW and Nunez, Nunez complained that he would have to give a cut of the money from a cocaine transaction to Fernandez and that the CW should have contacted Nunez first in order to purchase cocaine. At this time Nunez again unsuccessfully attempted to lure the CW to Washington Heights for a cocaine transaction.

17. The CW testified that in the end of January of 1992, Nunez met with him in an area of Washington Heights. It was at this location where they discussed having a cocaine transaction take place. Nunez wanted to show the CW that he had nothing to worry about such as getting robbed. However, the Government indicates that there is no recorded surveillance of this meeting in existence.

18. It should also be noted that approximately 500 grams of cocaine was provided to Sinde and ESA by Nunez in November of 1989. This cocaine was then exported to Greece, London, and England where it was then distributed by Sinde and Esa during December of 1989. In addition, on February 18, 1991, a cooperating witness (CW) in this case advised the FBI that he met with Reynolds in Brooklyn on February 13, 1991 and received one pound of marijuana for $2,000. The CW in this case advised the FBI that he owed Reynolds the money for the marijuana, but that the marijuana was already sold. Reynolds was never charged with the sale of the marijuana.

19. On June 17, 1993 Earl Reynolds was arrested at his residence in Queens, New York by the FBI.

20. On June 17, 1993, Carl Rogasta was arrested at his residence in Bricktown, New Jersey by the FBI.

21. On June 17, 1993, Thomas Gagliardi was arrested at his place of employment in Brooklyn, New York.

22. On June 17, 1993, Felix Nunez was arrested at his residence Manhattan, New York.

23. On June 18, 1993 Robert Santora voluntarily surrendered to the Secret Service at the Manhattan headquarters.

24. On June 21, 1993, Frank Desimone voluntarily surrendered to the FBI at the Manhattan headquarters.

25. Richard Sinde was arrested in connection with the instant offense on January 22, 1991 in Manhattan. He had been on bail for the illegal sale of diamonds. He is currently in federal custody.

26. Pablo Fernandez was arrested on October 18, 1993 at his residence in Manhattan.

27. As previously stated, Louis Esa was arrested on June 25, 1994 in Barcelone, Spain in connection with the instant offense.

Adjustment for Obstruction of Justice

28. The probation officer has no information to suggest that the defendant impeded or obstructed justice at the time of the arrest, or during the investigation or prosecution of the offense.

Adjustment for Acceptance of Responsibility

29. During the interview on July 20, 1994 conducted at the Metropolitan Correctional Center, Mr. Howard Getz, defense counsel was not present. The probation officer did not discuss specific details related to the instant offense with Fernandez as defense counsel was not present. In addition, on September 16, 1994, defense counsel contacted the undersigned and indicated that he has not yet determined whether

or not he will be submitting a written statement to our office related to Fernandez's participation in the instant offense.

Offense Level Computation

30. The November 1, 1993, U.S. Sentencing Guidelines were utilized in selecting the sentencing ranges.

31. **Base Offense Level**: In this case, Count Nineteen charges that the defendant violated 21 USC 846. Violations of 21 USC 846 are covered by Section 2Dl.l of the Guidelines. That section provides for offenses involving the *Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offense), Attempt or Conspiracy*, the assigned base offense level is specified in the Drug Quantity Table Section 2Dl.l(a)(3)(c) in the Sentencing Guidelines Manual. In this case, Fernandez is being held accountable for participating in a scheme to conspire to distribute 5 kilograms of cocaine from January of 1992 through October 18, 1993. As detailed in the offense conduct section of this report, there has been no cocaine seized in connection with this offense as of this date. This is a "dry conspiracy" in that Fernandez and the other defendants involved are responsible for discussing as well as organizing the sale of 5 kilograms of cocaine based upon tapes of conversations by the FBI as well as the assistance of a confidential informant. Therefore, pursuant to Section 2Dl.l(a)(3)(c)(6) of the Drug Quantity Table, at least 5 kilograms of cocaine but less than 15 kilograms of cocaine, establishes a base offense level of 32. 32

32. **Specific Offense Characteristics:** None 0

33. **Victim Related Adjustments:** None 0

34. **Adjustment for Role in the Offense:** None 0

35. **Adjustment for Obstruction of Justice:** None 0

36. **Adjusted Offense Level (Subtotal):** 32

37. **Adjustment for Acceptance of Responsibility:** We do not believe the defendant has shown recognition of responsibility for the offense and a reduction of three levels for Acceptance of Responsibility is not considered applicable under section 3El.l(a). 0

38. **Total Offense Level**: 32

39. **Chapter Four Enhancements**: None 0

40. **Total Offense Level**: 32

Offense Behavior Not Part of Relevant Conduct

41. None.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

42. None.

Adult Criminal Conviction(s)

43. A check with the FBI, the New York State Division of Criminal Justice Services, Bureau of Identification, New Jersey Municipal Arrest Recording System, U.S. Probation Office Southern District of Florida, Bergen County Probation Department (Pretrial Intervention Program), Ridgefield Municipal Court, and the Ridgefield Police Department reveals no prior criminal convictions for the defendant.

Criminal History Computation

44. The defendant has no known criminal convictions. Therefore, the defendant has zero criminal history points and a criminal history category of I.

Other Criminal Conduct

45. None known.

Pending Charges

46. None.

Other Arrests

47. **Date of Arrest**	**Charges/Court**	**Date Sentence Imposed/Dispo.**
48.		
4/26/89 (Age 28)	Criminal Possession of C.D.S. (marijuana) (Disorderly Person); Criminal Possession of C.D.S. (cocaine) With Intent to Distribute (3rd. degree). (Class A Felony), Docket # C415/416-89, Ridgefield Municipal Court, Ridgefield, NJ	1/8/92: Placed on supervisory treatment (Pretrial Intervention) for a period of 6 months. A total of $901 in court costs, fines, and lab fees paid in full.

49. On the above date, Fernandez as well as a co-defendant were operating a vehicle with tinted windows and a license plate light out of order. The vehicle was pulled over in Ridgefield, New Jersey by police. Fernandez, the operator of the vehicle, was unable to produce credentials. Police searched the vehicle and recovered a half burned marijuana cigarette in the passenger's door ashtray and a pack of Easy Rider rolling papers from the seat pouch of the passenger's seat. Also in the pouch were a zip lock bag of 6 grams of marijuana and a zip lock bag of 8 grams of cocaine. At that point Fernandez and the co-defendant were placed under arrest.

50. The Bergen County Pre-Trial Intervention Program (PTI) reported that Fernandez initially appeared at their office on February 27, 1992 where he was advised of the rules and conditions of Supervisory Treatment. Fernandez was advised that he would have to submit urine samples and that one test positive for controlled substances would result in termination

from the program. Any further arrests or failure to report as ordered would also result in termination.

51. In a violation statement dated May 21, 1992, PTI reported that Fernandez failed to report to his Pre-Trial Counselor as directed on March 24, 1992, April 21, 1992, April 28, 1992, and May 5, 1992 which was in violation of Rule 3 the Standard Conditions of Supervisory Treatment. In addition, Fernandez failed to comply with Rule #9 in that he did not leave urine samples as directed on March 24, 1992, April 21, 1992, and April 28, 1992. As a result, PTI recommended Fernandez be terminated from the program and the matter be returned to court.

52. On May 27, 1992, the court ordered Fernandez terminated from the PTI program. On June 11, 1992, a bench warrant was issued for the Fernandez's arrest for failure to appear in the Ridgefield Municipal Court to answer the violation of the PTI order. However, in November of 1993 defense counsel paid the Ridgefield Municipal Court in full for Fernandez's outstanding fine, lab fee, and court cost balances. At that time the matter was dismissed by the court.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

53. The following information was obtained by interviewing the defendant, Ramon Fernandez, Maria Fernandez, contact with the U.S. Probation office, Southern District of Florida as well as contact with the Immigration and Naturalization Service (INS).

54. Pablo Fernandez was born in Camray, Cuba on August 7, 1961 to the marital union of Ramon Fernandez, age 61, and Cladys (nee Valella), age 44. Both of the defendant's parents reside at 143 Bennett Avenue, Apartment #lL Manhattan, NY. His father is the building superintendent and his mother is a factory worker in New York City who is currently on sick leave. It should be noted that Bennett Garden Associates

owns the apartment building where Ramon Fernandez is the superintendent.

55. The defendant's father owns a home located at 738 N.E. 75th Street, Miami, Florida. According to Dade County, Florida property records provided to our office by U.S. Probation Officer Theresa D. Bradman of the Southern District of Florida, the home was purchased in 1988 for $45,000. The home is a single family residence with two bedrooms and one and one half bathroom.

56. Ramon Fernandez indicated that he brought his family to the United States in 1970 in order to find a more prosperous life. Their port of entry was Miami, Florida. The defendant's father has been the building superintendent of 143 Bennett Avenue since he arrived in New York City in 1972. In 1975, his family joined him in New York City. On August 23, 1994, Ramon Fernandez reported to U.S. Probation Officer Bradman during a field visit to the Miami home that he plans on retiring from his job in about one year. The entire Fernandez family plans on relocation to Miami at that time. The Miami home has also served as a vacation home for the family.

57. Ramon Fernandez indicated that his son Pablo is a hard worker and got involved with a criminal element which led to his arrest in connection with the instant offense. The defendant's father indicated that he will support and assist his son as much as possible after sentencing. The defendant will be welcomed back to his family upon release from imprisonment. Ramon Fernandez indicated that he is not aware of any use of controlled substances by the defendant. Further, Ramon Fernandez is not aware of the defendant having any prior criminal convictions.

58. The defendant has one sibling, Orlando Fernandez, age 34, who currently resides in his father's house in Miami. He is a field supervisor for Bryant Security Corporation, located at 108 South Miami, Avenue, Suite 300, Miami, Florida. He reported to U.S. Probation Officer Bradman that he moved

from New York City to Miami in 1990. He is not aware of any prior arrests of his brother Pablo, either in New York City or New Jersey. Orlando Fernandez requests the Court sentence his brother to a period of probation.

59. Pablo Fernandez married Maria (nee Garcia) age 33, in Manhattan , New York in 1983. They had met 5 years earlier as a result of both their parents introducing them to each other while they were teenagers. Two children were born to this marital union, David Fernandez, age 5, who has chronic asthma and is enrolled in a special education program in school and David Fernandez, age 2. The defendant's wife receives public assistance. Both reside with their mother as well as their grandmother, Ms. Garcia in a three bedroom, one and a half bathroom apartment located at 187 Pinehurst Avenue, Apartment #3G, New York, NY. The defendant's wife reported to the undersigned that Fernandez is a hard worker who got involved with a criminal element only to make quick cash in order to pay off outstanding bills. Fernandez only intended on robbing the co-conspirators in this case and never planned to further associate himself with narcotics on any further occasions. Further, the defendant's wife reported that her husband has no history of the use of controlled substances or mental health illness. She has no knowledge of any prior arrests of the defendant. In addition, Fernandez has maintained a close relationship with his children.

60. The defendant's wife further reported to the undersigned that although she separated from her husband on a temporary basis about two years ago, they had worked out their differences prior to the defendant's incarceration. Upon release from custody, most likely the defendant will reside with all of his family members in his father's house in Miami.

61. A review of the defendant's INS file reveals that the defendant is a legal permanent resident of the United States. The defendant and his family's port of entry was Miami, Florida in May of 1970. Pablo Fernandez came to New York

City to live in March of 1975. He applied for and was issued social security number 099-60-1951 in September of 1977. His alien registration number is A18791416. The file also indicates that Ramon Fernandez has been employed as the superintendent of 143 Bennett Avenue in Manhattan since August of 1972.

Physical Condition

62. Fernandez stands 5', 9", weighs 180 pounds, has black hair, and brown eyes. He does not have any scars or tattoos. Fernandez indicated that he is healthy with no history of serious health problems. Our office has uncovered no evidence to suggest otherwise.

Mental and Emotional Health

63. During the interview the defendant communicated both relevantly and coherently. He reported no mental health history prior to his incarceration in connection with the instant offense. However, upon being incarcerated, he began treatment for depression. As of this writing, our office has not received any information from the health administrator of the Metropolitan correctional center related to this issue.

Substance Abuse

64. During the interview Fernandez indicated that he had used marijuana in the past on a few occasions. However, he indicated no prior history of the use of other controlled substances or alcohol abuse. A urinalysis test was not conducted during the interview as Fernandez was in federal custody at that time. As of this writing, our office has not received any information from the health administrator from the Metropolitan Correctional Center related to this issue.

Educational and Vocational Skills

65. Fernandez indicated that he dropped out of George Washington High School, located at 549 Audubon Avenue, Manhattan, NY in either 1978 or 1979 in order to work. As

of this writing, our office has not received any documentation from George Washington High School related to this issue.

Employment

66. From 1992 and up to Fernandez's incarceration in July of 1994, he was employed as a part time gypsy taxi cab driver as well assisted his father with maintenance work at their apartment complex in Manhattan. The defendant did not recall his salary for this period and never personally owned a taxi cab. He was paid in cash during this period. This information was confirmed by Ramon Fernandez as well as Maria Fernandez.

67. Fernandez was employed as a doorman by Paul Dennis Associates located at 389 5th Avenue, New York, NY from 1985 through 1992. He did not recall his salary, but indicated that he was fired over a disagreement with management. As of this writing, Paul Dennis Associates has not responded to our request for employment data.

68. Fernandez reported that in the early 1980's, he was employed by Imperial Carpets located at 181st Street, New York, NY. He earned $250 a week as a rug cutter and reportedly resigned from his position as a result of being offered a higher paying job with Paul Dennis Associates. As of this writing, Imperial Carpets has not responded to our office's request for employment data.

69. Fernandez has no further periods of employment.

Financial Condition: Ability to Pay

70. The following information was obtained by interviewing the defendant, his father, a credit check, an examination of Fernandez's personal financial statement, as well as contact with the Internal Revenue Service (IRS).

71. Fernandez indicated on his financial statement that he currently does not have any cash, bank accounts, charge accounts, lines of credit, other assets (property of value), or debts.

72. A check with Equifax Credit Information services reveals that Fernandez has the following outstanding judgement balances from April of 1988:

Citibank NA	$2371
Citibank NA	$1650
TOTAL	$4021

73. As Fernandez is currently in federal custody, he currently does not have any monthly expenses.

74. The IRS reports that Fernandez did not file federal tax returns for the years 1990, 1992, and 1993. However, records reveal that in 1991 Fernandez filed a return (filing status single) claiming one exemption. His adjusted gross income was $2,284 and $162 in tax was withheld. On March 23, 1992, Fernandez was issued a refund in the amount of $148.

PART D. SENTENCING OPTIONS

Custody

75. Statutory Provisions: Count Nineteen - Ten years mandatory minimum and up to Life imprisonment pursuant to 21 USC 846 and 841 (b) (1) (A) .

76. Guideline Provisions: Based upon an offense level of 32 and a Criminal History category of I, the applicable sentencing range is from 121 to 151 months. (Zone D of the Sentencing Table)

Impact of Plea Agreement

77. None.

Supervised Release

78. **Statutory Provisions**: Counts Nineteen - A mandatory minimum of five years up to life time supervised release must be imposed following imprisonment pursuant to 21 USA 846 and §841(b)(1)(A).

79. **Guideline Provisions**: Pursuant to Section 5Dl.l(a), a term of supervised release is required to follow imprisonment when a sentence of more than one year is imposed, or when required by statute.

80. Pursuant to Section 5DI.2(a), if a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more that five years, or the minimum period required by statute, which in this case is 5 years.

Probation

81. **Statutory Provisions**: A term of Probation is expressly precluded by statute pursuant to 21 USC 846.

82. **Guideline Provisions**: Probation is not authorized by the Guidelines as the offense of conviction expressly precludes probation as a sentence pursuant to 18 USC 3561 (a) (2) (5Bl.l(b)(2)).

Fines

83. Statutory Provisions: Counts Nineteen - Up to $4,000,000 on the count of conviction pursuant to 21 USC 846 and 841 (b) (1) (A).

84. A special assessment of $50 on for the count of conviction is mandatory, pursuant to 18 U.S.C. 3013.

85. **Guideline Provisions**: The fine range for this offense is from $17,500 to $4,000,000 pursuant to Section 5El. 2 (c) (1) (3) and (C) (4) (A). (The Fine Table)

86. Subject to the defendant's ability to pay, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the Government of any imprisonment, probation, or supervised release, pursuant to U.S.S.G. 5El.2(i). The most recent advisory from the Administrative Office of the U.S. Courts suggests that a monthly cost of $1,734.00 be used for imprisonment, a monthly cost of

$180.90 for supervision, and a monthly cost of $1,132.00 for community-confinement.

Restitution

87. **Statutory Provisions**: Not Applicable.

88. **Guideline Provisions**: Not Applicable.

Denial of Federal Benefits

89. **Statutory Provisions**: Pursuant to 21 USC 862, upon the first conviction for possession of a controlled substance, a defendant may be declared ineligible for any or all Federal benefits for up to five years as determined by the Court. In addition, pursuant to 21 USC 862, the Court may require the defendant to participate and complete an approved drug treatment program which includes periodic drug testing, or to perform appropriate community service.

90. **Guideline Provisions**: Pursuant to Section 5Fl.6, *Denial of Federal Benefits to Drug Traffickers and Possessors*, the Court may deny the eligibility for certain Federal benefits of any individual convicted of distribution or possession of a controlled substance.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

91. The Probation Department has no information available to suggest that a departure from the guidelines is warranted.

Respectfully submitted,
Chris J. Stanton
Acting Chief U.S. Probation Officer

By /s/ Michael Wasmer
Michael F. Wasmer
U.S. Probation Officer
(212) 637-0040, ext.5160

mfw

Approved:

/s/ Chris A. Palladino 1/25/96
Chris A. Palladino Date
Supervisor

SENTENCING RECOMMENDATION
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
UNITED STATES V. PABLO FERNANDEZ, DKT.# 93 CR. 428-09 (JES)

TOTAL OFFENSE LEVEL: 32

CRIMINAL HISTORY CATEGORY: I

CUSTODY

Statutory Provisions	Count Nineteen – Mandatory minimum sentence of 10 years and up to life imprisonment.
Guideline Provisions	121 to 151 months.
Recommended Sentence	121 months.

PROBATION:

Statutory Provisions	Expressly prohibited by statute.
Guideline Provisions	Not authorized pursuant to Section 5B1.1(b)(2)
Recommended Sentence	N/A

SUPERVISED RELEASE:

Statutory Provisions	Count Nineteen: At least five years and up to life.
Guideline Provisions	Five years. (5D1.2(a))
Recommended Sentence	5 years

FINE:

Statutory Provisions	Count Nineteen: Up to $4,000,000.
Guideline Provisions	$17,500 to $4,000,000 plus the cost of custody and/or supervision.
Recommended Sentence	$0

RESTITUTION:

Statutory Provisions	N/A
Guideline Provisions	N/A
Recommended Sentence	N/A

SPECIAL ASSESSMENT:

Statutory Provisions	$50
Guideline Provisions	$50
Recommended Sentence	$50

Justification:

In this case, the defendant was charged with Conspiracy to Distribute 5 kilograms of Cocaine. As indicated in this report, this was a "dry conspiracy" in that Fernandez as well as other defendants were involved in organizing the sale of 5 kilograms of cocaine based upon tapes of conversations by the FBI as well as the assistance of a confidential informant. A 121 month sentence under Count Nineteen will satisfy the 10 year mandatory minimum and will serve as sufficient deterrence and punishment. It is believed that a 5 year period of supervised release upon release from imprisonment is necessary, as it will allow the U.S. Probation Office to monitor his activities and assist the defendant with reintegration into the community.

Based upon his financial status, it is unlikely that he will be able to pay a fine during a period of supervised release.

Voluntary Surrender:

Voluntary surrender is not an issue in this case as the defendant is already in federal custody. Based upon the seriousness of the instant offense as well as the fact that Fernandez's bail was revoked and he was remanded on July 8, 1994, voluntary surrender would not be appropriate under any circumstance.

District of Supervision:

If the defendant is sentenced to any period of supervision, it is recommended that the defendant be supervised by the district of residence.

Recommendation:

It is respectfully recommended that the Court sentence Fernandez to a period of 121 months imprisonment. Following release from imprisonment, a five year term of supervised release is recommended with the Standard Conditions 1 through 13 and the added special conditions outlined below coupled with the mandatory special assessment of $50.00.

1. That the defendant not possess a firearm or other dangerous weapon.

2. That the defendant make a good faith effort to maintain legitimate employment.

Respectfully submitted,

CHRIS J. STANTON
Acting Chief U.S. Probation Officer

By /s/ Michael Wasmer
Michael F. Wasmer
U.S. Probation Officer
(212) 637-0040, ext. 5160

mfw
Approved:

/s/ Chris A. Palladino 10/6/94
Chris A. Palladino Date
Supervisor

REVISED ADDENDUM TO THE PRESENTENCE REPORT

On December 22, 1995, the Honorable John E. Sprizzo ordered information deleted from the Presentence Investigation. Pursuant to Judge Sprizzo's order, paragraphs 5 through 17 (all references to the fraudulent credit cards) were deleted from the revised Presentence Investigation.

Respectfully submitted,

CHRIS J. STANTON
Acting Chief U.S. Probation Officer

By /s/ Michael Wasmer
Michael F. Wasmer
U.S. Probation Officer
(212) 637-0040, ext. 5160

mfw

Approved:

/s/ Chris A. Palladino 1/25/96
CHRIS A. PALLADINO Date
Supervisor

[Letterhead of]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

New York, New York
January 29, 1996

Mr. Scott ~~W~~Long, Case Manager
Otisville FCI
P. O. Box 600
Otisville, NY 10963

Re: Pablo Fernadez
USM#: 35185-054

Dear Mr. ~~W~~Long:

On December 22, 1995, the Honorable John E. Sprizzo ordered information deleted from the original presentence investigation. Pursuant to Judge Sprizzo's order, enclosed is the revised presentence investigation. Please destroy all prior copies of the presentence investigation that may be in your institution's possession.

You may contact the undersigned officer at (212) 637-0040, ext. 5160 regarding any questions you may have.

Respectfully submitted,

CHRIS J. STANTON
Chief U.S. Probation Officer

By /s/ Michael Wasmer
Michael F. Wasmer
U.S. Probation Officer

mfw

enclosure.

UNITED STATES CODE
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART I - ORGANIZATION OF COURTS
CHAPTER 3 - COURTS OF APPEALS

§ 46. Assignment of judges; panels; hearings; quorum

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
FEDERAL SENTENCING GUIDELINES
CHAPTER TWO–OFFENSE CONDUCT
PART D–OFFENSES INVOLVING DRUGS
1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

(1995)

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristic

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

* * *

(c) DRUG QUANTITY TABLE [omitted]

(d) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply section 2A1.1 (First Degree Murder).

Application Notes:

[Notes 1 – 11 and 13 – 18 omitted]

12. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. **See** § 1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

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(1998)

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristic

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(6) If the defendant meets the criteria set forth in subdivisions (1) to (5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.

(c) DRUG QUANTITY TABLE [omitted]

(d) Cross Reference [omitted]

Application Notes:

[Notes 1 – 11 and 13 – 20 omitted]

12.

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In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
FEDERAL SENTENCING GUIDELINES
CHAPTER THREE--ADJUSTMENTS
PART C—OBSTRUCTION

(1998)

§ 3C1.1. Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

COMMENTARY

Application Notes:

1. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant.

2. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.

3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

(a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(b) committing, suborning, or attempting to suborn perjury;

(c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (**e.g.**, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurs contemporaneously with arrest (**e.g.**, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) conduct prohibited by 18, U.S.C. 1501-1516.

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise application guideline range:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;

(c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(d) avoiding or fleeing from arrest (**see, however**, section 3C1.2) (Reckless Endangerment During Flight).

5. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.

6. Where the defendant is convicted for an offense covered by section 2J1.1 (contempt), section 2J1.2 (Obstruction of Justice), section 2J1.3 (Perjury or Subornation of Perjury;

Bribery of Witness), section 2J1.5 (Failure to Appear by Material Witness), section 2J1.6 (Failure to Appear by Defendant), section 2J1.9 (Payment to Witness), section 2X3.1 (Accessory After the Fact), or section 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation prosecution, or sentencing of the obstruction offense itself (**e.g.**, where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of section 3D1.2 (Groups of Closely-Related Counts). The offense level for that group of closely-related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

7. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.